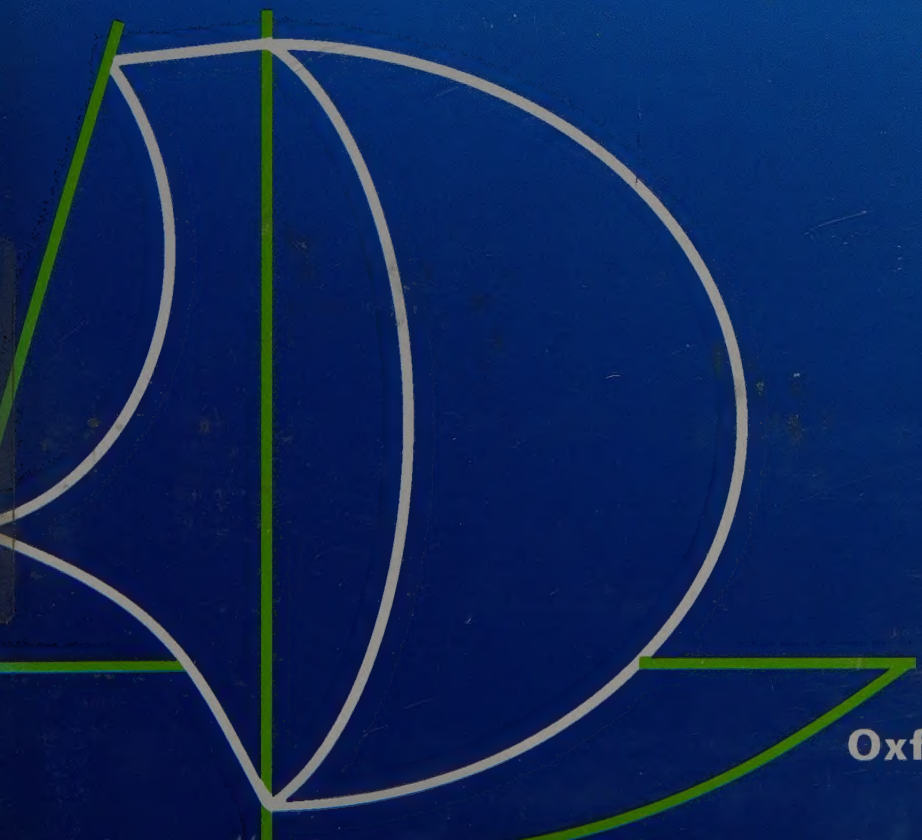
Dilara Choudhury

Constitutional Development in Bangladesh

Stresses and Strains



Oxford

Constitutional Development in Bangladesh

Stresses and Strains

Although Bangladesh enacted its constitution within nine months of its independence — on 16 December 1972 — efforts to run the government on constitutional lines were soon thwarted by its all powerful leader Sheikh Mujibur Rahman and his party the Awami League. Tracing the chequered history of constitutional development in Bangladesh, Dr Dilara Choudhury carefully analyses the many factors that have hampered the smooth functioning of parliamentary democracy in Bangladesh. These include a party system characterized by narrow sectarian interests instead of broad principles, recurring military intervention, socio-economic injustices, and personal aggrandizement of the leaders and the bureaucratic elites. Although centred around the political turbulence and constitutional dilemmas of Bangladesh, this book provides illuminating insights into the workings and problems faced by constitutional governments in Third World countries.

Constitutional Development in Bangladesh

Stresses and Strains

Constitutional Development in Bangladesh

Stresses and Strains

Dilara Choudhury

Karachi
Oxford University Press
Oxford New York Delhi
1994

Oxford University Press, Walton Street, Oxford OX2 6DP
OXFORD NEW YORK TORONTO
DELHI BOMBAY CALCUTTA MADRAS KARACHI
KUALA LUMPUR SINGAPORE HONG KONG TOKYO
NAIROBI DAR ES SALAAM CAPE TOWN
MELBOURNE AUCKLAND MADRID

and associated companies in

BERLIN IBADAN

OXFORD is a trade mark of Oxford University Press

ISBN 0 19 577507 4

Printed in Pakistan at
Mueid Packages, Karachi.
Published by
Oxford University Press
5-Bangalore Town, Sharae Faisal,
P.O. Box 13033, Karachi-75350, Pakistan.

Contents

To
a misunderstood patriot
my husband
G W Choudhury
and
to my children
Pappu, Sayeed, Lipi, Jui

Preface

The constitution and its development, as the supreme legal framework of a country, is a continuing process so that the hopes and aspirations of its populace can be accommodated along with socio-economic changes. A constitutional government is enshrined with a value system which ensures societal change as well as justice, liberty and freedom of the individual. As such it is a sacred document whose formal institutional arrangements provide the mechanism to check the arbitrary actions of the executive and channels for the populace to influence the decisions of the government.

Many Third World countries are still experimenting with the functioning of constitutional government. Many have been successful where constitutional development has taken place keeping in line with the peoples' demands and interests, whereas in other cases, constitutions were aberrated due to various factors, such as gargantuan socio-economic challenges and erosion of civil and political institutions giving rise to overdeveloped military-bureaucratic apparatus.

Constitutional development in Bangladesh has largely been as chequered as it had been in the erstwhile part of Pakistan. I became keenly aware of the nature of its development while I was doing research on the external relations of Bangladesh at Columbia University, 1989-90. It is evident that external policies and internal political determinants are interlinked. So while I was engaged in my research, I had to pay full attention to the internal political development of the country, as well as to the growth of constitutionalism. I made up my mind to take up the constitutional development of Bangladesh as my next subject of research and study.

In expressing my sincere thanks I would mention Professor Emajuddin Ahamed whose help and encouragement were valuable. I am also indebted to Professor Kazi Saleh Ahmed, Vice Chancellor Jahangirnagar University, Savar, Dhaka, for granting me leave of absence in order to pursue my research. My thanks are due to *Janab* Kazi Tauhid Hasan, Chief Librarian, Sangsad Library, for the special help I received while I was going through the relevant documents in the library. For one and a half years, I made numerous visits to the library, and he and his staff helped me smilingly and ungrudgingly.

As major part of the research was done at Columbia University, New York, I would like to take this opportunity to express my sincere thanks to Professor Ainslee Embree, Department of History, and the staff of the International Affairs library for their kind help. I am greatly thankful to the Asia Foundation, in particular to Dr. John Somers, the then country representative of the Foundation, for giving me a modest grant.

I must also express my affectionate feelings for my family, my sons Pappu and Sayeed, daughters-in-law Lipi and Jui for encouraging me during my research at home and abroad. Above all, my heartfelt gratitude to my husband, Professor G W Choudhury, for letting me 'disturb' our married life. He was indeed patient, kind and inspiring, in spite of the fact that I was at the time, according to him, married to my research.

I hope my work on constitutional development in Bangladesh will stimulate other scholars to undertake research and publications on the growth of constitutionalism in Bangladesh.

The opinions expressed in this book are entirely mine and I alone am responsible for any shortcomings.

Dilara Choudhury

Columbia University, New York
13 November 1992.

Introduction

Every country has a constitution, but this does not necessarily imply that every country in the world is endowed with a constitutional government or the practice of constitutionalism. Constitutional experts such as KC Wheare and Lord Bryce have elaborately defined various constitutions which are in existence today. According to Lord Bryce, 'A constitution is a frame of political society, organized through law; that is to say, one in which law has established permanent institutions with recognized functions and definite rights.'[1] It also establishes the relationship between the government and the governed but it does not explicitly differentiate between a constitutional government and a non-constitutional one.

The factor which makes a government a constitutional one is the limiting of governmental powers by both substantive and procedural legal measures. The restrictions put on the actions of governmental powers are based on the consensus of the governed. The absence of arbitrariness, personal will or caprice is the predominant feature of a constitutional government. It is fundamentally a government of law.

This view of constitutionalism is widely accepted by constitutional experts. Charles Howard McIlwain in his thought-provoking analysis of the concept of constitutionalism, made the following comment: 'It [constitutionalism] is a legal limitation on government; it is the anti-thesis of arbitrary rule; it is opposite to despotic government, the government of will instead of law.' He further points out that 'the most ancient, most persistent and the most lasting of the essentials of true constitutionalism still remain what has been almost from the beginning, the limitation of government by law.'[2]

McIlwain, however, was addressing the issue at a time when constitutionalism was threatened all over the world, especially

in Europe, with the rise of Nazism in Germany and Fascism in Italy. He was expressing the classical liberal view of constitutionalism by emphasizing the concept of a 'Government of Law,' whose fundamental basis was the protection of the rights of the individual. This concept of liberal constitutionalism, which in turn is interrelated with the protection of individual rights, has been traced to 'the evolution of constitutionalism in its relations to liberalism, rationalism and individualism' (the Puritan Revolution). The most distinctive root of modern constitutionalism is 'the belief in the dignity and worth of each person, each human being, no matter how lowly. Each man is supposed to possess a sphere of genuine autonomy. The constitution is meant for the protection of the self; for "self" is believed to be the primary and ultimate priority.'[3] This preoccupation with the 'self,' rooted in religious beliefs, eventually gave rise to the notion of Fundamental Rights during the nineteenth century. These rights were synonymous with bourgeoisie rights and interests as the concept of 'modern constitutionalism found its apogee during laissez-faire.'[4] It found its classical expression in John Locke's theories of 'freedom of contracts' and 'rights of private property.' But the fact remains that a government ruled by law not only protects the interests of the property but also of individuals. In the words of McIlwain, 'the agitator for a communist revolution, like the capitalist, is in danger of forgetting that law does something more than merely protect vested rights of property: in capitalistic states it is law alone that leaves the agitator free to preach capital's overthrow.' As such, 'the problem of constitutionalism then, is everybody's problem, whatever economic or social system he may prefer. It is law alone that gives protection to rights of any kind in any individual, personal as well as proprietary, whatever form the state may take and whatever the nature of social control.'[5]

Hence the function of a constitution is based upon defining and maintaining individual rights whose concept has been broadened and expanded with progressive democratization of constitutionalism. The transformation of nineteenth century 'bourgeoisie democracy' into 'popular democracy,' especially since the Second World War has injected a new spirit and dynamism into constitutionalism, and its underlying postulations

are the existence of a limited government and the protection of human rights and the liberty of the political community against any interference by the state. Among these rights, twentieth-century constitutionalism is more protective of substantive rights.

The fundamental difference between the basis of nineteenth century constitutionalism, and that of the twentieth century, i.e., the non-arbitrary nature of the constitution, has remained intact while the concept of individual rights has undergone a profound transformation, thanks to the democratization of constitutionalism in nineteenth century Great Britain before the establishment of full representative government. Though the underlying idea of democracy is that the government is based on popular consent, derived through elections and universal franchise, a government freely elected by adult franchise does not automatically guarantee a constitutional government. In the words of KC Wheare, 'Universal suffrage can create and support a tyranny of the maturity of one man... The absolutisms of the twentieth century have usually been based upon universal suffrage and a compulsory universal suffrage at that. Have not modern tyrannies been returned to power by majorities of over ninety per cent?'[6] In spite of that, it must be remembered that there is a strong co-relationship between the two: 'The ideals of democracy, like the ideals of constitutionalism, emphasize the overriding importance of each human being'[7] and make the two compatible and complementary by providing a mechanism to limit governmental powers, make the government accountable to the people, and provide techniques and format for a peaceful transfer of power.

While there is general agreement that democracy and constitutionalism are not incompatible, there can be some valid arguments that in some cases the correlations between democracy and constitutionalism may give rise to some paradoxical phenomena. Constitutionalism, in its rigid form, in the eighteenth and nineteenth centuries implied a rigid sphere of 'private' jurisdiction. Democracy, as well as constitutionalism are, however, both dynamic in nature. The ultimate objective of both is the welfare of the citizen. Until the nineteenth century protection of private property, for instance, was considered an important ingredient of constitutionalism. Any encroachment on the

individual's private property would be regarded as unconstitutional. But in today's welfare state the democratic state is assuming an ever-increasing role in socio-economic spheres. Under the changing concept of the role of government, private property may rightfully be encroached upon in order to achieve a fairer and more equitable distribution of wealth. Constitutionalism is not threatened by the extension of such governmental authority as long as these activities are done not in the interest of any individual or group, but for the community as a whole. If we look upon democracy and constitutionalism in this spirit, then we have no difficulty in agreeing with the conclusion that, 'there is no inevitable tension between democracy and constitutionalism. The tasks for the future are to devise appropriate conceptions of democracy and to design constitutional provisions that will support rather than undermine them.'[8]

Thus, twentieth century constitutionalism has three dimensions. They are, the structure, procedures-processes, and, principles of constitutionalism. No particular form of government represents constitutional government. It may be classified in many ways: presidential or parliamentarian, federal or unitary, but one distinctive criterion for separating governmental systems is the one which distinguishes the difference between Rule of Law and Authoritarianism. In a system based on the Rule of Law, a society and its people are subjected to certain absolute norms and regulations; nobody, not even the government, is above the law. However, under an authoritarian system everything is decided by decrees made by an individual or a group of individuals. A constitutional government must also abide by certain established rules and regulations, whether they are written, as in the United States, or based upon conventions as in Great Britain.

The procedures and processes of constitutionalism can be both written and unwritten. The most common way to have the political order formalized is to have a written constitution initiated by the Instrument of Government (1648). This concept is not a 'prerequisite' of constitutionalism, as 'true constitution can be found in unwritten procedures used to change the substantive policies of the formal document.'[9]

Informal procedures call for the existence of a multi-party system, periodical free and fair elections, forms of representation,

and the existence of an independent judiciary in order to implement the goals of constitutionalism, i.e., establishing a free society with constitutionally guaranteed rights of citizens, as well as fulfilling the hopes and aspirations of the people. Since constitutionalism means limited government, questions may be raised as to how and what forms of limitations are imposed. And to what extent are the limitations observed in practice? How these issues are handled in practice, determines the nature of constitutionalism in a particular country. Professor de Smith prescribes what he considers the minimum constraint or limitation for constitutionalism: 'A contemporary liberal democrat, if asked to lay down a set of minimum standards, may be very willing to concede that constitutionalism is practised in a country where the government is genuinely accountable to an entity or organ distinct from itself, where elections are freely held on a wide franchise at frequent intervals, where political groups are free to organize in opposition to the government in office and where there are effective legal guarantees of fundamental civil liberties enforced by an independent judiciary; and he may not easily be persuaded to identify constitutionalism in a country where any of those conditions are lacking.'[10]

Marxian view of constitutionalism

The theory of constitutionalism as evolved by western liberal scholars and democratic philosophers was challenged by Marx and Engels. According to the classical theory of constitutionalism the state is limited by law, laws that are meant for achieving the welfare of its citizens. But Marx in his *Communist Manifesto* presented a strongly negative theory of the state, that the state is nothing but an instrument of class struggle. The proprietary class, or capitalists, control the economic forces or means of production. With economic power in their hands, they exploit the rest of the society, i.e., the working class (proletariat). The state provides a mechanism by which the working class is deprived of its share of the rewards. By introducing his theory of production, 'the labour theory of value,' and his concept of 'surplus value,' Marx tried to prove that because they lack

control of the means of production, the working class does not get the full benefits of its hard labour and that capitalists extract this benefit from the proletariat by taking away, what he terms as 'surplus value,'[11] from them.

If this is the sole function of the state, i.e., depriving the proletariat of the due share of their labour, how could the state be a constitutional or a truly democratic one?

Marxism, therefore, believes that the state will 'wither away' or disappear as soon as class exploitation is ended, and in a classless society, the state, in its present form, must 'wither away.' Marxist-Leninist theories, however, acknowledge the need for a temporary entity before the state is finally abolished. This transitional system is 'the Dictatorship of the Proletariat.'[12] Therefore, the classical concept of constitutionalism seems to be incompatible with the Marxian theory of state.

The Marxist insists that the ultimate objective of constitutionalism, namely, the establishment of a fair and equitable society for everyone, irrespective of class, cannot be achieved through the traditional concept of the democratic state. It is only through the establishment of a state (temporary), one which is based on the principles of Marxism, that this is possible. The Marxist will not deny that political rights are required by traditional concepts of constitutionalism, but they contend that it is worth sacrificing those 'illusory' rights and privileges in order to achieve lasting and real ones.

If we look at the constitutions of what was the Soviet Union and those of East European countries prior to the recent changes, we find that many of the phenomena which are cherished and valued by the believers in constitutionalism are missing. Western scholars, in particular, find it extremely difficult to regard any form of dictatorship, such as, 'Dictatorship of the Proletariat,' acceptable to any form or idea of constitutionalism or democracy. It is true that the constitutions of the Soviet Union and those of East European countries had a long list of fundamental rights and in fact all familiar civil and political rights. But in practice, because of the dictatorship of the Communist Party, these fundamental rights and other liberties were only on paper.[13] As Carl J Friedrich has pointed out, a constitution cannot be regarded as ideal, even if it fulfills the generalized concepts of philosophical, legal or political standards. It must be supported by 'the distinct

notion of constitutionalism as a kind of political order which contrasts with non-constitutional systems such as totalitarian dictatorship. In order to develop such a concept, a constitution must be defined in a way that indicates the features which make it contrast with other kinds of political order.'[14]

Thus, a communist government can be anything but constitutional since its governmental powers are not limited by any procedures. The communists' emphasis was on economic justice and a fair and equitable distribution of wealth. Marxism-Leninism became a new challenge to the traditional concept of constitutionalism. Their argument was that without a fair economic system or welfare state, there cannot be true constitutionalism. So, we find that the rise of Marxism-Leninism and the emergence of a number of socialist or communist states after the Second World War, constituted for countries of Africa and Asia, the Marxist-Leninist concept of a fair and equitable society and had strong appeal. We find in the constitutions of these emergent countries some strong references to the problems of economic justice and fairness. However, the number of communist countries in the Third World are not many, as only a few, such as Vietnam, North Korea, Laos and Cambodia in Asia, formally adopted this system. Of course, the largest Asian example is China. In Latin America the most conspicuous case was that of Fidel Castro's Cuba. In Africa, there were a few temporary examples of Marxist states.

In all these countries, we find a new and greater emphasis on the economic aspects of 'fundamental rights.' Fundamental rights, they believe, should include not only the familiar political and civil liberties such as freedom of press, expression and thought, and the right to form associations and political parties, but should also include other basic human rights, such as the right to work, right to leisure, etc.

In particular, the concept of 'right to private property' has been challenged, and even in non-socialist or non-communist countries unqualified 'right to property' has been modified in order to achieve a fairer and more equitable economic order without which the benefits of constitutionalism or democracy are not complete. A free tongue with an empty stomach is meaningless, as has become evident in the poorer countries of the Third World.

So while the Marxist concept of absolute rule by the communist party or proletarian dictatorship is not compatible with the broad aims and objectives of constitutionalism or, those of a democratic state, Marxism-Leninism brought some new concepts to the idea of constitutionalism with its goal of achieving general welfare by emphasizing the economic aspects of human rights.

Seven decades of communist rule in the Soviet Union and Eastern Europe, as well as in China, however, have not shown any signs of the 'withering away' of the state. On the contrary, the state machinery in the communist countries assumed greater and greater control over the population. It was rightly said that communism was becoming the dictatorship over the proletariat. Finally, the Marxist-Leninist system failed in the Soviet Union and in Eastern Europe, making way for democratic systems and the rule of law. The only large existing communist state today is the Peoples' Republic of China in Asia.

Communism or no communism, the emphasis on the economic aspects of human rights is a new and desirable development in the theory and practice of constitutionalism. Finally, we may add that some socialist countries, like the Scandinavian countries, have achieved a synthesis between economic justice and political freedom, thereby demonstrating that a socialist state can be established within the framework of constitutionalism.

Socialism without Marxism

Since the Second World War, democracy and constitutionalism have been widely experimented with by emerging Third World nations. These have been the battle cries of the twentieth century, as most Afro-Asian countries, which were under the shackle of European colonial rule, carried forward their national liberation movements under this banner. Woodrow Wilson's call for the 'right of self-determination' and President Roosevelt's annunciation of the 'Four Freedoms' in 1941, created unprecedented hopes among the nationalist leaders of the emerging countries. They dreamed of creating sovereign states within which the ideals, hopes and aspirations of their people would be fulfilled. The leaders of these new nations hoped to end

exploitation, and ensure social and economic justice as well as political freedom which had so long been denied to them by their colonial masters. The charter of civil liberties, thus, held a special significance for them. Naturally, the political order they chose was inspired by liberalism, individualism and rationalism—principles deeply rooted in western tradition and civilization.

The adoption of western constitutional governments by the new nations came as no surprise. Most of them had lived under a political order introduced by their colonial masters. Powers were transferred under provisional constitutions which were derived from colonial powers after years of progressive devolution. Former British colonial countries obviously opted for the parliamentary system, based on the western model. Likewise, others copied the system of their respective European rulers.

The western model was soon rejected by a majority of Afro-Asian countries and was commonly replaced by one-party authoritarian systems. Throughout the 1950s and 1960s, western liberal thinkers attributed the developing countries' inability to grasp the western model from a purely 'nationalist' point of view.[15] Factors such as the absence of political and philosophical traditions, established beliefs in the essential elements of democracy such as the principle of toleration, the concept of an officially recognized opposition, acceptance of the idea of a pluralistic society, and existence of voluntary non-political associations were considered significant in the developing countries inability to work with a democratic system. Lack of education and rampant illiteracy, and the absence of a vigilant public opinion and a free press were thought to be contributory causes. The imperative of these 'prerequisites'[16] led some scholars, however unwillingly, to accept military intervention in the politics of developing countries as a necessary evil.[17] The uniqueness of the Third World and its peculiar socio-economic and political phenomena were not accounted for by many experts.

The term Third World still strikes a sensitive chord in many. Centuries of colonial rule and its impact on post-colonial countries can hardly be exaggerated. The manifestations of the colonial legacy are multidimensional in the administrative,

bureaucratic, and even psychological spheres.[18] Most important of all, it is the 'peripherility',[19] economic, social and political, which makes the political dynamics of these countries so unique. The combination of their historical legacies and 'peripherility,' more than anything else, prompted most post-colonial Afro-Asian countries to opt for 'populist socialism.' They rejected both the western as well as the former Soviet model as they neither propagated the status quo nor a fundamental change in the social, economic and political systems of these countries. They also refused to espouse the model offered by revolutionary states like Cuba, Angola or Nicaragua. In the majority of instances, this was simply an attempt by nationalist leaders to use the state machinery in order to bring benefits to the people which they thought necessary. The ways and means deployed in such instances were those which the leaders 'thought' were beneficial to their countries and populace. No attempts were made to restructure the social, economic and political patterns of the country as the Marxian notion of class structure was an anathema to most of these leaders. Most of them relied on the pre-independence class structure from which they drew their support. In the process, the fundamental spirit of constitutionalism was lost in the debris of the nationalist 'ideologues' rhetoric. Stresses and strains on constitutionalism thus resulted from a number of factors, some of which are discussed below.

The party system in new democracies and its impact on constitutionalism

In his classic book on democracy, Lord Bryce points out the correlation between political parties and democracy: democracy cannot function without the party system. The existence of more than one political party, divided by broad principles, rather than narrow, sectarian, racial, and ethnic differences is regarded as one of the fundamentals for the successful working of democracy and constitutionalism. In the West, party systems are the result of long-term, complex historical developments extending over centuries, as in Great Britain. Well-organized political parties in these countries, by aggregating and articulating various interest groups, provide mechanisms of

conflict resolution and influence policy-making decisions of the government. Institutionalized parties thus play the role of integrating the society by absorbing new social classes into the community.

The importance of organized political parties in the new democracies can hardly be overemphasized. An institutionalized party system is an absolute necessity to these countries' efforts to modernize. An effective party system not only accelerates the process of modernization by successfully integrating new social forces into the community, it also creates constructive opposition parties in order to limit the powers of the executive.

The experience of party systems in most emergent nations has not, however proved fully successful. A majority of these countries have demonstrated a tendency towards one-party systems which encourages arbitrary executive rule. The political parties which led the nationalist movements in many of these nations, were, on independence, either fragmented or they chose to transform into one-party systems by eliminating others in the field of competitive politics. Fragmented parties, whose numbers ran into hundreds in many cases, created acute political instability, giving rise to the demand for a strong authoritarian party in order to achieve order and stability. Before it could be decided whether a particular country required a two-party or multi-party system, the system itself withered away making the prospect of democracy rather grim. The underlying idea was that the nationalist leader who won the country's hard-earned independence should be armed with arbitrary powers because he was thought to be the one who could deliver the fruits of independence, which could not be gained in any other way. All powers must then emanate from the leader and the leader alone. He would be like a 'patriot king' who was 'to espouse no party, but govern like the common father of his people.'[20] This tendency towards a one-party system hindered the creation of a constructive loyal opposition. It should, however, be pointed out that a number of new democracies, especially India, have been able to build an institutionalized base for a stable party system. This has made India the largest democracy in the world. The credit goes to the Congress Party and its leadership for increasing the organizational strength

of the party by harmonizing the roles of the traditional groups with those of the modernizing party.[21]

Thus, the growth of a sound political party system, which is necessary to 'buckle various social forces to one another, creating a basis for loyalty and identity transcending parochial grouping,'[22] and to carry out governmental policies of national integration and economic development, has been retarded in most emergent nations. The result has been a breakdown of constitutional politics ranging from one-party dictatorships to military interventions to civil wars.

Military intervention and constitutionalism

A significant factor impeding the growth of a healthy constitutional order in the post-colonial Afro-Asian countries is military intervention in politics. Since the 1950s military intervention in the form of *coups d'etat* have been taking place with bewildering frequency, and three-fourths of the newly emergent states have already experienced some form of military rule, either direct or indirect. The military in Third World countries has risen as an independent political institution posing threats to civil institutions such as civil bureaucracies, legislatures, political parties and judiciaries, which are essential for the working of constitutionalism. Various theories offered by experts on military politics explain the role of the military, causes of intervention and their impacts and effects on society. Since independence, developing countries have been besieged with enormous problems of national-integration, nation-building, socio-economic inequalities, and economic injustices. In search of modernization most countries adopted a liberal democratic model. But soon it was evident that of the political and administrative institutions left behind by their colonial rulers, the military was the strongest. In spite of this fact the capacities of the military to intervene vary from country to country. This capacity to intervene increases in countries which have been termed by Finer as a 'distinct class' with 'peculiar political phenomenon,' whereas according to Huntington, it is the lack of the institutionalization of the political process which makes countries prone to army intervention.[23] It is, however, the

'centrality of the state' in most Third World countries which makes military intervention so tempting. In the face of a weak civil society, the state, no matter how fragile, represents the only organized force, which is difficult to control except by its own agency.[24] Again, the peculiarity of Third World politics triggers army intervention, which in turn puts enormous strains on the smooth working of constitutionalism. Contrary to the predictions of some military *pundits*, military interventions in Third World politics have had negative impacts on the evolution of a healthy constitutional order. Huntington's thesis that military rule accelerates the institutionalization process has been proven incorrect. Nordlinger, in his study of seventy-four non-western, non-communist countries, showed that there is no significant difference in impacts on the process of modernization and economic development between countries which experienced military interventions and the others which did not.[25] Most important of all, almost none of the military regimes have created a civil successor-regime. So, from the point of view of constitutional order, 'their record is profoundly disappointing.'[26]

Socio-economic challenges in the new democracies of Afro-Asian countries

We have already referred to some of the challenges and problems confronting the emergent democratic states in Afro-Asian countries. These challenges create serious inhibitions to the growth of constitutionalism in these countries. Some of the problems emanate from the social structure of these polities, which are not homogenous. The populations of most of these countries are amalgamations of various ethnic groups who live within borders hastily drawn by their colonial rulers, who paid little attention to the actual physical location of these diverse groups. The borders of many countries were drawn dividing ethnic groups with the result that now we have ethnic groups living on both sides of an international border.

These ethnic differences quite often lead to tensions and struggles which may sometimes be violent. Conflicts may occur on political, economic, or cultural issues. The governments of these new countries which have inherited, from the former

colonial powers, these divergent social orders try to achieve national integration by complicated and lengthy processes. In some cases national integration is achieved, though not fully, but in other cases they lead to dismal failure as in Pakistan (1947-71). They have led to civil wars in countries such as Ethiopia and Sri Lanka, causing severe damage to both economic and political development.

Social structure in new states

Societies in developing countries are characterized by the existence of a small modern elite, and the vast masses of the population following traditional cultures. A group of the western-educated elite, one of the legacies of colonial rule, occupy a special place in these societies and consider their role vital to the process of nation-building.[27] They were the first to be exposed to western liberal philosophy and their role during the nationalist movements was crucial. Although they were exposed to liberal philosophy some of them were strongly attracted to socialism, since their fight was to alleviate the economic miseries of their people. These modernizing elite were thus committed to policies, be they socialist or capitalist, whose implementation resulted in rapid economic growth. But the modernizing activities of these governments quickly became dysfunctional due to a 'gap'[28] between the modernizing elite and the traditional masses. 'The underlying tensions are everywhere much the same: village versus town, land versus cash, illiteracy versus ambition, piety versus excitement.'[29] In their eagerness to modernize, they adopted 'foreign' machineries whose language, approach and objectives were quite incomprehensible to the masses. Professor Morris-Jones, in his book *Government and Politics in India*, discusses the various 'levels of politics' in India which operate on three levels—modern, traditional and saintly.[30] Without the fusion of all three levels, the task of nation-building is difficult. Thus, modern institutions and machines, whether political or economic, lose much of their effectiveness when confronted with traditional techniques and mechanisms. It seems that most of the modern institutions have been grafted on older ones

instead of trying to bring a gradual adjustment between the two.

Political leadership in the new democracies

Among these challenges, the issue of an able, honest, and dedicated leadership is also a vital one. In countries where political parties are not yet well developed or well organized, where the vast majority of the population is either illiterate or barely literate, where public opinion is not fully articulate, the quality of leadership becomes very important.

In many emergent nations the process of democracy and constitutionalism, after an initial rough sailing, have been set on a firm footing due to mature and pragmatic leadership. Universal suffrage in an illiterate country has compelled governments to expand educational facilities and increase the rate of literacy. The introduction and continuance of democratic government has increased the size of the middle class from a marginal number to a formidable one. These changes have enhanced the chance of a stable democracy and have been made possible due to pragmatic leadership. Given the right direction by able leaders, many of the 'prerequisites' of a constitutional government can be successfully tackled. Malaysia, Philippines, India and Sri Lanka are some examples. The leaders of these countries were able to institutionalize the political process through political acumen, charisma and a pragmatic approach.

The question of leadership has become an even greater issue due to 'the changes in the character of politics' during the twentieth century. Increased state activities in this century have given rise to executive leadership in the developed nations, calling for the redefinition of the politics of leadership. In developed nations, the institutional provisions for executive leadership minimized the importance of personal leadership, though its importance cannot be completely ignored.[31]

But as we turn to politics of the developing nations, the issue of personal leadership takes on a different dimension, especially in the post-colonial countries. The democratic institutions in these countries are fragile and the executive leaders rule by mass appeal and through broad political powers. The

rise of a charismatic leader is rather common. Charismatic leadership can be successful in transitional societies due to various social and political phenomena peculiar to these societies.[32] But the success or failure of charismatic leaders depends on how they use their charisma. A charismatic leader can bridge the gap between modernity and tradition by pushing 'institutional development.' In doing so he has to relinquish his personal power in favour of institutionalization. He has to make a conscious choice between the use of his arbitrary power and the power to create institutions.[33] This is a critical choice which may set the future course of polity because individuals take cues from their leaders or follow their examples. We may here recall Montesquieu's classic statement: 'At the birth of societies, it is the leaders of the Commonwealth who create the institutions; afterwards it is the institutions that shape the leaders.'[34] Instead, most Third World nationalist leaders identify themselves with the government, in fact, with the state itself. Their charisma, intellectualism, and distinct characteristics of being leaders of independence movements contribute to a peculiar frame of mind to the effect that they alone are able to decide the fate of their respective nations. This authoritarian tendency prevents these leaders from dismantling the colonial administration. The parties they lead are swiftly relegated to the background, as these leaders, being backed by new variants of socialism and newly created one-party systems, take arbitrary decisions for national interests. This creates serious impediments in the workings of the emerging democratic orders.

Within the background of the above mentioned model, the history of Bangladesh's constitutionalism will be discussed in the pages that follow. Since independence, the country has experimented with both liberalism and 'developmental socialism' under Sheikh Mujib, along with 'controlled democracy' under the bureaucratic-authoritarianism of Ziaur Rahman and HM Ershad. None of these models have had lasting success in this small South Asian nation.

Bangladesh is a Third World nation in the classical sense. The legacy of British colonialism and 'internal colonialism' by Pakistan, its external economic dependency, its helpless 'peripherality,' geo-political situation and external penetration, meagre resources, overpopulation, unsuccessful development

strategies, *pahari* insurgency, (tribal insurgency in the Chittagong Hill Tracts) all contribute to making its Third World status almost proverbial. As a result, state-building and nation-building have remained elusive. No viable constitutional government has yet evolved. Recently, however, parliamentary government has been restored after a free and fair election held in February 1991. A strong opposition party has emerged in the parliament. The judiciary is playing a more independent role. Though there are still 'black laws,' there seems to be a better climate, including a more congenial international environment, for a free society in Bangladesh today. It is too early, however, to pronounce a final verdict on the present system in Bangladesh. One cannot expect that overnight, all the limiting factors relating to democracy would 'wither away' and free political order would be ushered in but one hopes, at least, the process has begun. As noted by a South Asian expert, 'National unity, a free society, economic development, a welfare state, national security, are all problems intimately bound up with the need for constitutional stability... it is to be hoped that the political leaders profit by the lessons of the past and press their views within the existing order.'[35]

In the following pages, an attempt will be made to analyse the working of constitutionalism in Bangladesh by examining the various organs of the government: executive, legislative, and judiciary. Finally, a critical assessment of the actual working of these organs will be made in the concluding chapter entitled 'Democracy in Bangladesh.'

NOTES

1. Bryce, James Lord, *Studies in History and Jurisprudence*, Vol. 1, p. 195.
2. McIlwain, CH, *Constitutionalism: Ancient and Modern*, (Ithaca, New York: Cornell University Press, 1940), p. 241.
3. Friedrich, CJ, *Constitutional Government and Democracy*, (Lexington, Massachuetts: Xerox College Publishing, 1968), p. 6.
4. McWhinney, Edward, *Constitution-making, Principles, Process, Practice*, (Toronto: University of Toronto Press, 1981), p. 9.
5. McIlwain, CH, *Constitutionalism in Changing Societies*, (London: Cambridge University Press, reprinted in 1969), pp. 266-7.

6. Wheare, KC, *Modern Constitutions*, (London-New York: Oxford University Press, 1966), p. 139.
7. Friedrich, CJ, *Constitutional Government and Democracy*, rev.ed., (Boston: Ginn and Company, 1950), pp. 25-7, 31-2.
8. Elster, Jon, & Slagstead, Rune, eds., *Constitutionalism and Democracy*, (Cambridge-New York: Cambridge University Press, 1988), pp. 352-3.
9. Magrath, CP, *Constitutionalism and Politics: Conflicts and Consensus*, (Glenview, Illinois: Scott, Foresmann & Company, 1968), pp. 1-2.
10. de Smith, Stanley, A., *The New Commonwealth and Its Constitutions.*
11. For details, see Cole, GD, *Meaning of Marxism*, (Ann Arbor: The University of Michigan Press, 1966).
12. Plamentz, J, *German Socialism and Russian Communism*, (London: Oxford University Press, 1955).
13. Nwabuezc, BO, *Constitutionalism in Emergent Nations*, (Rutherford: Fairleigh Dickinson University, 1973).
14. Friedrich, CJ, *'Constitutions and Constitutionalism,'* in Shills, David R, (ed.), *International Encyclopedia of Social Science*, (New York: Macmillan & Free Press, 1968), Vol. 3, p. 319.
15. Huntington, SP, *Political Order in Changing Societies*, (New Haven: Yale University Press, 1967).
16. Lipset, SM, *'Some Social Requisites of Democracy,' American Political Science Review*, Vol. 53, 1959.
17. Huntington, SP, *Political Order in Changing Societies*, op. cit.
18. Nandy Asish, *The Intimate Enemy: Loss and Recovery of Self under Colonialism*, (Delhi: Oxford University Press, 1983).
19. Clapham, Christopher, *Third World: An Introduction*, (US., Canada: The University of Wisconsin Press, 1985).
20. Bolingbroke, Lord, *The Idea of a Patriot King*, (London: Hansardon, 1809), pp. 280-1; cited in Huntington, SP, *Political Order in Changing Societies*, op.cit, pp. 368-69.
21. Weiner, M, *'Traditional Role Performance and Development of Modern Political Parties: The Indian Case,'* in *Political Parties and Development*, (Princeton: Princeton University Press, 1963).
22. Huntington, SP, *Political Order in Changing Societies*, op. cit, p. 413.
23. Huntington, SP, op.cit.
24. Clapham, Christopher, op.cit.
25. Nordlinger, E, *'Soldiers in Mufti: The Impact of Military Rule upon Economic and Social Changes in the Non-Western States,' American Political Science Review*, Vol. 64, No. 4, 1970, pp. 1131-8.
26. Finer, SE, *'The Man on Horseback-1974,' Armed Forces and Society: An Interdisciplinary Journal*, Vol. 1, No. 1, Fall, 1974, p. 25.
27. Shils, E, *'The Intellectuals in the Political Development in the New States,'* in Kautsky, JH, *Political Change in Underdeveloped Countries*, (New York: John Wiley & Sons Inc., 1962).
28. Shils, E, *'Political Development in the New States,' Comparative Studies in Society and History*, Vol.II, 1959-60.

29. Lemer, D, *The Passing of Traditional Society*, (Glencoe: The Free Press, 1958), p. 44.
30. Morris-Jones, WH, *The Government and Politics in India*, (Cambridge: The Eothen Press, 1987), pp. 52-3.
31. Seligman, LG, *'The Study of Political leadership,' American Political Science Review*, Vol. 44, 1950, pp. 904-15.
32. Seligman, LG, *'Elite Recruitment and Political Development,' Journal of Politics*, Vol. 26, 1964, pp. 612-26.
33. Huntington SP, *'Political Development and Political Decay,' World Politics*, Vol. 17, 1965, pp. 386-430.
34. Montesquieu's statement, cited in Rustow, Dankwart A, *The World of Nations: Problems of Political Development*, (Washington, DC,: The Brookings Institute, 1967), p. 165.
35. Wheeler, Richard S, *Pakistan*, in Kahin, George McT., 2nd ed., *Major Governments Asia*, (Ithaca, New York: Cornell University Press, 1963), p. 526.

The Executive

The dominant political theme in the West during the last half of the nineteenth century was the establishment of the sovereignty of the people, exercised through a democratically elected representative body called the legislature. The battle cry of the last century was therefore to reinforce the supremacy of the parliament and limit the powers of the executive. The legislature has been viewed as the most important organ of the government. The twentieth century, however, witnessed the emergence of a strong executive as nineteenth century liberalism gave way to broader democratization, which called for increased state activity. The role of the modern state today is immensely different from that of the last century. In the past, limiting the state's powers had been necessary in order to protect political liberties, but today greater state involvement is called upon to ensure both political and economic justice.

As such, the executive branch of the government has become the most prominent. Today the executive needs to be strong, stable, and capable of taking action in order to tackle the complexities of modern life. But at the same time, the increased powers of the executive must not encroach upon the liberties of the citizens. The task of bringing about a balance between the two has been the greatest challenge of the twentieth century, especially in the Third World countries where the need for a strong executive has to be counterbalanced through constitutional mechanisms.

While adopting a constitution, most post-colonial countries give considerable attention to the type, nature, and powers of the executive branch. Three models are usually looked up to as examples to follow: the British cabinet system, the American presidential system and the Swiss collegiate executive. Recently, however, the French model which is a synthesis of the

parliamentary and presidential systems, has drawn the attention of a number of countries.

Bangladesh emerged as an independent country after a brutal nine-month civil war. The liberation war started with the Pakistan army's crackdown on 25 March 1971. The legal basis of the Provisional Government, established on 10 April 1972, was provided by the Proclamation of Independence Order with restrospective effect from 26 March 1971. The constitution established under this order created an all-powerful presidential executive. Both executive and legislative powers, including the power to grant pardon, were vested in the president. He had the power to appoint a prime minister and other ministers, if he considered it necessary to do so. The power to summon and dissolve the assembly, as well as that of levying taxes and expending monies, was exclusively vested in him. Furthermore, the president was entitled to do whatever was necessary to establish an orderly and just government for the people of Bangladesh.

The creation of an all-powerful executive is not uncommon under special circumstances, especially during a revolutionary war situation. Drastic and quick steps needed during wartime can be facilitated by a powerful executive without his being constrained by unnecessary parliamentary hassles. There are instances when a group of people, a nation, or a sub-nation trying to achieve independence by resorting to armed uprising, take such extraordinary measures. The most conspicuous example is that of the US Declaration of Independence of 4 July 1776, when the population of the thirteen British Colonies revolted against the English monarch George III by waging a war. There are recent instances as well. The independence struggle of the people of Palestine is a case in point. The Palestine Liberation Organization even has a parliament in exile. In Bangladesh, the Order created an all-powerful presidential executive given the extraordinary circumstances prevailing at the time of the liberation war.[1] Sheikh Mujibur Rahman was named President of the Republic since the independence movement was carried out in his name. Since he was still held in a jail in Pakistan, an office of vice-president was also created which was to exercise all powers, duties and responsibilities of the president. Bangladesh was

to be governed under the proclaimed constitution until a new constitution was adopted.

Bangladesh, thus began its journey as an independent nation under a presidential system in which, the president had unchecked and unrestricted powers. The adoption of the presidential system by the Provisional Government of Bangladesh, which was constituted by prominent members of the Awami League (AL), made a departure from the Awami League's long standing commitment in favour of parliamentary democracy.[2] But the creation of an executive with sweeping powers was needed, as pointed out earlier, because of the emergency situation of the liberation war. This action of the Awami League is not without precedent. History has demonstrated that whenever grievances need to be settled quickly, the concentration of powers in one leader often become inevitable. The Awami League, however, reverted to the parliamentary form of government, which we shall look at in detail later.

Before discussing the change of government and adoption of the Constitution of 1972, let us briefly analyse the nature and form of the executive under parliamentary forms of government. The system originated and evolved in England, developing over centuries. It was later adopted by the older dominions like Australia, New Zealand and Canada, as well as by former colonies such as India, Pakistan and Sri Lanka. The unique feature of a parliamentary executive is that it consists of two components, 'ceremonial' and 'effective,' which has been termed by Bagehot as the 'dignified' part of government.[3] The real executive power is vested with the 'efficient' part, namely the cabinet, whereas the 'dignified' part of the executive is merely ceremonial with no real power. There is no fixed tenure for the executive as he can remain in power as long as he commands the daily confidence of the legislature. The first British Prime Minister, Walpole, was in power for twenty-one years and this trend was again recently evidenced by Mrs Thatcher's term as prime minister, which lasted for more than a decade. On the flip side of the coin, a prime minister can be removed from office within a short time. The nearest and most recent examples are of Chandra Shekhar of India and Benazir Bhutto and Nawaz Sharif of Pakistan.

Another feature of a parliamentary executive is the fusion between the executive and the legislature. Before the true nature of the English Constitution was known, it was believed that there could not be any true form of constitutionalism without the separation of powers between the legislature and the executive. But a parliamentary executive, through ministerial responsibility, achieves the similar desired result. The cabinet is in a sense a committee of the legislature, but recent developments in the parliamentary system have also demonstrated that the tenure of the legislature is also determined by the executive through its power to dissolve parliament. In a nutshell, 'either the ministry leads the majority or it accepts the supremacy of the legislature. If it cannot, or does not want to, follow the one or other of these alternatives, there are two further possibilities: it may dissolve the legislature or resign.'[4] Lastly, the parliamentary system calls for strict neutrality of the 'dignified' part of the government. The ceremonial executive must be separated from the real executive so that the 'ceremonial' executive can mediate and intervene, though, discreetly, in case of a conflict between the executive and the legislature. This particular issue raises questions such as the 'ceremonial' executive's mode of election, if he is not a hereditary monarch, his sphere of powers, and the relationship between the executive and the legislature, the cabinet and the head of state.

Since the Bangladesh liberation war was fought on the basis of the six-point and eleven-point programmes, both of which had advocated the parliamentary form of government, the adoption of a parliamentary system in Bangladesh seemed to be a foregone conclusion. Even in India, where power was transferred under a parliamentary form of government through the Indian Act of Independence, 1947, there were debates about the type and nature of the executive to be adopted in the future constitution. In the Indian Constituent Assembly, a small minority group had advocated a presidential form of government as in the US in order to ensure stability in a country as diverse as India. The Swiss form of collegiate executive was also looked into, which provides both stability and responsibility at the same time. Of course, it is well known that most members of the Indian Constituent Assembly, especially Nehru, felt that a presidential system could only work where there was a close

union between the executive and the legislature. The parliamentary system has a better mechanism for preventing conflicts between the executive and the legislature and in promoting harmony between different parts of the governmental system.[5] Consequently, the parliamentary form of government was adopted in India.

But in Bangladesh there were no such debates about the type and nature of the executive to be adopted. There were hardly any discussions on constitutional issues. The journey towards the parliamentary system started soon after Sheikh Mujib's return from Pakistan on 10 January 1972. Using his legislative power under the Proclamation of Independence, he changed the basic structure of the revolutionary government and adopted a parliamentary form of government by a presidential order called the Provisional Constitution of Bangladesh Order, 1972. The Provisional Constitution created by the above mentioned decree had all the features of the British Westminster type of government with a council of ministers headed by a prime minister to aid and advise, and a ceremonial head of the state, namely the president.

The order enabled Sheikh Mujib to step down to become the prime minister, whereas Section 8 provided the opportunity for Justice Abu Sayeed Chowdhury, who was not a member of parliament, to assume the presidency until another president was elected according to the constitution framed by the Constituent Assembly.[6]

The cabinet form of government was thought to be suitable for Bangladesh not only to fulfil 'the manifest aspirations of the people of Bangladesh that a parliamentary democracy shall function in the country,' but also to other factors as well. First, since its inception in 1949, the Awami League had committed itself in favour of a parliamentary form of government; second, the political class of Bangladesh has been familiar with the system since the time of British colonial rule; third, the influence of British liberal philosophy on prominent Awami League leaders such as H S Suhrawardy, who happened to be the political mentor of Sheikh Mujib; and fourth, the influence of the lawyer politicians within the Awami League. Lawyers in the Indian subcontinent have had a long tradition of involvement in parliamentary politics.

Both during the British, as well as the Pakistan era, lawyers played a very prominent part in defending the political rights of the citizens against the arbitrary powers of the government. Even in small towns there were pools of lawyers who understood and practised parliamentary politics. During the Pakistan period, it was they, more than any other group, who were convinced that the absence of a proper parliamentary system, deprived the Bengalis of a fair share of participation in the country's political and economic affairs. This sense of deprivation was felt from the very beginning, as Pakistan during the initial years, was under a perverted parliamentary system in which real power was concentrated in the hands of a small coterie of non-Bengali civil and military bureaucrats.

The situation, however, changed somewhat with the adoption of the 1956 Constitution. For the first time the two wings of former Pakistan agreed on a compromise formula.[7] The 1956 Constitution of Pakistan provided not only for a parliamentary form of government, but sought to protect the system by statutory provisions against arbitrary dismissal of the cabinet by the head of the state, as happened in Pakistan under its interim constitution.[8] But neither the fate of parliamentary democracy nor that of the Bengalis, improved in any marked way, except during the thirteen months of the Suhrawardy Cabinet, (1956-8). Thus, the distrust and opposition to any other form of government other than a genuine parliamentary form continued to persist among the then East Pakistanis.[9] Until the imposition of Martial Law in 1958, the politicians had at least a limited sense of involvement in the nation-building process. The parliamentary form of government, thus, found a special standing among the Bengali intelligentsia.

A fifth factor was that the parliamentary form of government is thought to be the most democratic, since the government of the day is constantly in the public eye through parliamentary mechanism, and given a vigilant public opinion, it remains responsible and sensitive to public issues. Lastly, there was the influence of India. The 'Indian example' factor in constitution-making in Bangladesh in 1972 was quite important. The preamble, directive principle, and other elements were heavily borrowed from the Indian Constitution. As India had and still has, a successful system of parliamentary form of

government, Bangladesh readily accepted it. It was, however, only one of the several factors influencing the adoption of the parliamentary form.

The main factor seemed to be the sad experiences of East Pakistan under the perverted presidential system introduced in Pakistan under Ayub Khan in 1962 which continued until the breakup of united Pakistan in 1971. Under the political order of the Ayub-Yahya regimes, the Bengalis lost all share in the decision-making process in Pakistan. It was simply domination by a small West Pakistani ruling elite and the Bengalis were reduced almost to a people under colonial rule. In the minds of the Bengalis the presidential system epitomized dictatorial rule. The parliamentary system, on the other hand, became almost synonymous with true democracy.

The executive under the Provisional Constitutional Order

The change in the form of government under the Provisional Constitutional Order thus ostensibly completed a historic task. It had all the features of a parliamentary executive, but in reality the executive continued to exercise unrestricted powers. There was no ministerial responsibility in the absence of a parliament. As a matter of fact, Shiekh Mujib, like an all powerful president under the Proclamation of Independence Order, continued to rule Bangladesh through proclamations and decrees until the constitution was adopted on 16 December 1972.

The executive system under the original 1972 constitution

We have examined the reasoning in favour of parliamentary government among the Bengali intelligentsia, particularly the Awami Leaguers. So, when the time for framing a constitution for the country came in 1972 there were hardly any debates or doubts, as pointed out earlier, that it would be a parliamentary one. A thirty-four-member Draft Committee

headed by the Law Minister, Dr Kamal Hossain, was set up on the very day the Constituent Assembly convened. The committee was dominated by Awami League members, excepting a lone opposition member from the Ganatantri Party. After seventy-four meetings and nearly 300 hours of deliberation the committee submitted its report to the Constituent Assembly on 12 October 1972. The Constituent Assembly after eight working days of debate unanimously adopted an unqualified form of parliamentary system.

Part IV of the Constitution (Articles 48-58) dealt with the executive, the president, the prime minister and the cabinet—encompassing issues such as the qualifications of the president, his term of office, methods for the removal of the president, etc. Similarly, with regards to the prime minister and the cabinet, the Constitution provided familiar provisions relating to their appointments, tenure and removal from office, etc.

The type of executive adopted under the original 1972 Constitution had the traditional features of a parliamentary executive. It consisted of two components: a ceremonial head of state in the form of the president and an effective prime minister, such as found under the usual parliamentary system.

The president of the republic

The relationship between the two parts of the executive in parliamentary systems are not the same in various constitutions, though they may be broadly classified as parliamentary ones. The exact relationship between the ceremonial and real parts of the executive is based in some cases on conventions and well-established traditions, as in England, Australia, Canada and India, while in some cases, as in the Third and Fourth Republics in France, the 1949 Basic Law of the Federal Republic of Germany, or in the 1956 and 1973 Constitutions of Pakistan, this relationship is not merely based on conventions but also on specific provisions of their respective constitutions.

Both in France (Third and Fourth Republics), and Germany (Basic Law 1949), every act, save the power to nominate the premier or chancellor, needed to be countersigned by the premier/chancellor or by a competent minister. In the 1956

Constitution of Pakistan the president's power of dismissal and appointment of the prime minister was based on both conventions and subjective provisions. The then Governor-Generals of Pakistan, Ghulam Mohammad and Iskander Mirza, misused the power causing instability and incalculable damage to the growth of the nascent democratic process in Pakistan.

When Pakistan disintegrated and a new and smaller Pakistan emerged in 1971, ZA Bhutto, who was the architect of the 1971 tragedy became the President of the new Pakistan. Left to himself, Bhutto would probably have preferred the presidential form of government. But like the Awami League in Bangladesh, he and his party were committed to a parliamentary system. So he had to opt for a parliamentary form, but he ensured that the prime minister was all-powerful and reduced the president to a really nominal entity.[10] He included a number of written provisions which made the advice of the prime minister binding on the president, as well as requiring that every act of the president was to be countersigned by the prime minister.[11] A host of other articles in the 1973 Constitution of Pakistan reduced the office of the president to insignificance while paving the way for a prime ministerial form of government.

The framers of the original 1972 Constitution of Bangladesh were also extremely careful to limit the powers of the president in order to establish a democratic parliamentary system. The relationship within the executive was based on a mixture of conventions and written safeguards. There was to be a president who would be the head of the state, elected by a majority vote of members of parliament through a secret ballot. The question of direct election or of a broader electoral college was considered inappropriate since it would have given the president a higher status and would have put him somewhat above the prime minister and the cabinet. This approach was in line with some of the existing parliamentary systems. Similarly, the parliamentary practice of ensuring the president's right of being informed by the prime minister was safeguarded.[12] The president's power to appoint a prime minister who appeared to have the command of the majority in parliament was reaffirmed. Usually, in a traditional parliamentary system, power to nominate a prime minister is given to the head of state, as was under the French Third and Fourth Republics and as under

the Basic Law of the Federal Republic of Germany, 1949, but the actual appointment of a leader who appeared to have the command of the majority in parliament was left to convention, as in the case of England. In Bangladesh, in the original Constitution of 1972, the power to appoint a prime minister was given to the president, the requirement that he should appoint one commanding a majority in the legislature was ensured by a written provision. The sacking of Prime Minister Khawaja Nazimuddin in Pakistan, who still commanded the majority, and appointment of Chaudhry Mohammed Ali as Prime Minister, in 1953, by the Governor-General, despite the fact that he did not have any majority in the legislature, probably made the framers of the constitution extra cautious, and they included such a safeguard.

Curiously, no provision was made specifically to vest executive powers either with the president or the prime minister, though the president was vested with the supreme command of the defence forces. Article 48 (2) only provided that the president would be the head of state and would exercise powers and perform duties conferred on him by the constitution, whereas Article 55 (2), (4) laid down that the executive authority of the Republic was to be exercised by, or, on the authority of the prime minister, in the name of the president. Unlike Bhutto, who under the 1973 Pakistan Constitution had the executive authority vested in the office of the prime minister by a written provision (Article 90), the 1972 Constitution of Bangladesh was ambiguous in this respect and left it to the office of the prime minister.

As pointed out previously, all but one member of the thirty-four-member Constitution Draft Committee were Awami Leaguers. The psychology and past political experiences of these members seemed to have contributed to the shaping of the office of the prime minister. Two factors profoundly influenced them. First, the personality factor. Unfortunately, the political culture of Bangladesh has become 'personality-centred.' This is more than evident in the leadership pattern of our political parties. Most political parties including the Awami League, as we have pointed out earlier, are personality-oriented. Sheikh Mujib in 1972, was at the peak of his popularity and there was no one in the party equal to him. As the office of the

prime minister was destined for him, it was to be created for him. He was the undisputed leader, the fountainhead of all powers, and he knew what was to be done for Bangladesh. So, unlike in a cabinet or parliamentary government in which the institutions or the permanent structures of the government shape the office of the prime minister, defining what must be done, and what cannot be done,[13] the individual or person was more important in shaping the office of the prime minister. According to one member of the Draft Committee, if Tajuddin instead of Mujib were to have been the Prime Minister of Bangladesh, the constitutional provisions for prime ministerial office would have been traditional, as found in India or Australia.[14] Second, the undemocratic activities of Governor-Generals like Ghulam Mohammad and Iskandar Mirza of Pakistan in undermining the authority of the prime minister which thwarted the parliamentary process in Pakistan, weighed heavily on the minds of the framers of the 1972 Constitution.

The president in a parliamentary system, usually makes appointments to some non-controversial and non-political offices, such as the chairman and members of the Public Service Commission, Chief Election Commissioner and Election Commission members, and Judges of the Supreme Court and of the High Courts, and the Attorney General. The 1972 Constitution of Bangladesh also included such provisions and these powers were kept in line with those of a traditional parliamentary system, i.e., binding on the advice of the cabinet.

Legislative powers of the president

The president in a parliamentary system is an integral part of the legislative process. The most important legislative power of the president is the ordinance-making power. He is entitled to issue proclamations when parliament is not in session and under unusual circumstances. But these proclamations must be laid before parliament for its approval; if they are not approved by parliament, they become null and void. It is in reality a legislative power exercised by the executive under special circumstances.

He is also given the power to summon, prorogue and dissolve the legislature, which, however, is supposed to be exercised, thanks to well-established conventions, only on the advice of the prime minister. In England, the classic land of parliamentarianism, the King ceased to exercise this power long ago without any written provisions but through convention. Both in the 1950 Indian Constitution and in the 1956 Constitution of a united Pakistan, such was the provision. It was thought that as long as the council of ministers enjoyed the confidence of parliament a president who acted without the advice of the prime minister could be impeached. So, even though there are no written provisions, the president is usually bound by convention.

In the original 1972 version of the Bangladesh Constitution, the president is bound to dissolve parliament if the prime minister advises so,[15] in case he loses the confidence of the legislature. This power of dissolution is still a matter of controversy in parliamentary systems. According to Sir Ivor Jennings, the monarch may refuse the advice of a defeated prime minister to dissolve parliament if the King has good reasons to believe that an alternative government could be formed in the existing parliament. But in practice this has not happened for a long time.

But in some other parliamentary systems, the situation has not been so simple or clear. In India, as recently as 1990, the president refused to accept the advice of Prime Minister V P Singh to dissolve the House when another leader, Chandra Shekhar, could be made prime minister with the help of Congress (Indira Gandhi faction). We may also cite here the recent case in Australia where the Governor-General John Kerr, dismissed Prime Minister Whitlam and dissolved parliament in a complicated situation of constitutional deadlock and confusion.[16] Similarly, even where there is a strong parliamentary executive such as in the case of the Federal Republic of Germany, the president can play an important role vis-á-vis the chancellor. He can dissolve the Bundestag if there is a plain vote of no-confidence against the chancellor (i.e., a vote of no-confidence without naming a successor) or he can back a weak chancellor by declaring, at the request of the federal government, a state of legislative emergency. The president, thus, can play a vital

role in either strengthening a weak chancellor or, compelling him to resign.

So, we find that the power to dissolve the house by the head of the state is neither uniform in all parliamentary systems, nor is the debate settled on this issue. The use of this discretionary power, however, is vital since it can affect the proper functioning of a parliamentary system. When we turn to the original Constitution of Bangladesh, it would appear that the framers of the Constitution had decided in favour of the prime minister in the matter of dissolution of parliament. Article 5(2) provided that if the prime minister advised the president to dissolve parliament, that advice would be binding on the president. The president would have no other choice. Presumably this was done to guard against any arbitrary use of this power by the head of state, as was experienced in Pakistan in 1954, when the Governor-General Ghulam Mohammed, dissolved a 'sovereign parliament' without any advice from the prime minister or the cabinet.[17] The framers of the 1972 Constitution of Bangladesh thus ensured that no repetition of that drama would take place.

Thus, the office of the president was truly relegated to a mere constitutional head of state like that of the British monarch. In contrast to this, in parliamentary systems such as those of India and Australia, the president was not only reduced to a figure-head, but was 'an arbiter or umpire between competing claims and contesting parties.'[18] In these countries it has been assumed that in case of constitutional deadlock, the president should play a constructive role by resolving the issues impartially. But under the 1972 Constitution no such powers were given to the president. He was made a mere figure-head.

The ministry

The procedure established by the original 1972 Constitution with regard to the formation of a cabinet was similar to that of Great Britain. The leader who had the command or who appeared to be the leader of the majority in parliament, was to be appointed as prime minister by the president of the Republic.[19] The president in theory, could appoint a prime

minister through his discretion, but unlike Great Britain he did not have much freedom in the context of the party system in Bangladesh. The French President, under the Third Republic, was entitled to name the premier, but in practice he appointed the premier after consulting the best informed men, such as presiding officers of the Senate and Chambers of Deputies, Committee Chairmen and other party leaders. But thanks to the party system in France, the president could if he wanted, have a premier of his choice through manoeuvring. Under the Fourth Republic, the president's power to name a premier was much more restricted. Under the Basic Law 1949 of the Federal Republic of Germany, the president has the power to appoint and dismiss a chancellor, but in actual practice, the Bundestag elects a nominee through negotiation and removes him through a 'constructive vote of no-confidence.'

The selection and appointment of a prime minister under the original 1972 Constitution was simple and straightforward. Other members of the cabinet were appointed by the president on the advice of the prime minister.[20] As pointed out earlier, the real executive power was to be exercised by the prime minister[21] and he would be aided by a council of ministers who would hold office at his pleasure.[22]

Sheikh Mujib was the leader of the Awami League and almost all members of the Constituent Assembly belonged to the same party and had an ideological affinity. Moreover, the power of appointment and dismissal of the members of his cabinet, as well as the effective power to dissolve parliament,[23] were to make him the unquestioned leader of the group. Through his disciplinary powers and party connections, it was easier for him to assert his leadership and command absolute supremacy within the cabinet. The prime minister's dominance was also made effective by making the tenure of the prime minister's office subject only to the majority will of parliament. The cabinet was to be collectively responsible.[24]

What is the picture that emerges about the nature of executive authority under the original 1972 Constitution of Bangladesh? In theory, the extent of the authority of the prime minister was not made as extensive as in the 1949 Basic Law of the Federal Republic of Germany or the 1973 Pakistan Constitution. The reason seemed to be that Bangladesh had neither a legacy

of a strong executive as in Germany, nor did Mujib have any doubt about his unlimited authority and power in the country, unlike his counterpart in Pakistan, Z A Bhutto.

More significantly, the executive authorities both in India and Pakistan are protected by some strong provisions against any real or potential 'inroad' of popular control through provisions for preventive detention, security acts, emergency powers and similar provisions. We find similar provisions in the democratic Constitution of India (1950) and in various constitutional drafts and actual constitutions of 'undivided' Pakistan. Mujib and his party which had almost always been in the opposition in 'undivided' Pakistan, had raised strong opposition to such restrictive provisions, or 'black laws,' in a free democratic constitution.

Again we find that in the prevailing circumstances, i.e, Mujib's faith in unlimited popular support and unqualified confidence in his power and popularity, led the framers of the constitution to opt for an undiluted form of parliamentary democracy without any statutory provisions restraining the powers of the executive. Attempts were made to establish a genuine Westminster-type of parliamentary system in which the protection of the government depended on the parliament's vigilance, 'which...is the true political sovereign of the State —the majority of the electors of the nation.'[25]

Failure of the first experiment of democracy in Bangladesh

In the preceding pages we have described how the people of Bangladesh under Sheikh Mujib's leadership adopted a parliamentary form of democracy amidst great fanfare and expectations. Bangladesh was created in the expectation of building a 'Golden Bengal' *(Sonar Bangla)* where the centuries-old suppression, oppression, injustices, persecution and prosecution of the people of Bangladesh would come to an end. The constitutional machinery as set up by Mujib was considered a vehicle for achieving an 'exploitation-free' society.

The framers of the constitution almost unanimously granted adequate, if not unlimited powers to the prime minister, an

office which was occupied by their popular leader, Shiekh Mujibur Rahman. Mujib could be described as a populist and he seemed to have faith in the peoples' control and supremacy. He had unlimited confidence in his personal popularity among the people. He therefore had no hesitation or fear in introducing a political order free from all restraints and limiting executive authority which one rarely finds, even in a parliamentary system. In this sense, the 1972 Constitution of Bangladesh could be described as being of a Jeffersonian model, a political system which is based on the myth of popular control and supremacy. The 1972 Constitution, therefore, was a bold measure in a revolutionary environment.

But Bangladesh, with its many gargantuan socio-economic problems and volatile political dynamics, was probably not the right place to have the luxury of such a constitution. The government began to face, soon after the creation of Bangladesh, major challenges in all spheres, political, social, and economic. In spite of Mujib's unique and dominating control of the party, as well as his popularity among the people, he was not able to face or solve the challenges confronting the new nation. Soon Mujib seemed to have realized the need for a stronger political system to deal with the situation.

His political party, the Awami League, began to manifest splits and dissensions. Squabbling and factionalism became the norm of the ruling party. This led to many problems, the most serious being widespread corruption, nepotism and favouritism. These were some of the factors which ultimately led to the failure of the first experiment in parliamentary democracy and the rise of authoritarian rule.

Let us examine the various factors responsible for the failure of parliamentary democracy and the rise of one-party dictatorship in 1973-5:

(i) Constitutional factors

A parliamentary system is a rather difficult and delicate system to operate. In order to work smoothly, certain basic requirements are essential, such as an impartial and effective head of state; a strong and independent parliament, and an effective and powerful opposition party—'Her Majesty's Loyal

Opposition.' Were these factors present in the political order of 1972?

There was a titular head of state whose powers and role were somewhat restricted as compared to the mature parliamentary systems found in England and in several other countries. Even today, the English monarch and her counterparts in older member countries of the Commonwealth have retained some powers like the 'right to be informed,' the 'right to advice,' and the 'right to warn.'[26] The equation between the president and the prime minister, however, depends not so much on the wordings of the constitution as the personality and position of the holders of the two offices.

In the first phase of Bangladesh politics (1972-5), Mujib, the prime minister, had clear-cut and absolute supremacy over the two ceremonial Heads of State, Abu Sayeed Chowdhury and Mahmudullah. Neither of them had the courage or the conviction to stand up against any arbitrary or unconstitutional action of the prime minister. Neither could they demand the reverence and courtesy normally accorded to the holder of such an office. They had the authority to ensure the sanctity of the constitution. But neither one could perform his duty to preserve and protect the constitution when its provisions were misused by the government, whereas in a parliamentary system, the head of state, being neutral and above party politics is supposed to maintain the balance of the constitutional order. So the first political order of Bangladesh during the Mujib era was more in the nature of a 'prime minister's dictatorship' than a genuine parliamentary one.

Relations between Mujib and his cabinet colleagues were also those of subordination rather than 'one among equals.' Mujib used to treat his cabinet colleagues more like a cabinet in a presidential system such as the American one, where the president's decisions are accepted no matter whether they are shared by cabinet majorities or not. There is a famous quotation of Abraham Lincoln made after he had consulted his cabinet: 'Nos, seven, ayes, one. The ayes have it.'

When we turn to the actual role and status of the parliament, we find a pathetic state of affairs. The parliament, in a parliamentary system, is regarded as the most important organ. As it consists of the representatives of the people, its role is

vital. In a modern state, the legislature, besides law-making, performs the vital role of being the watchdog of the peoples' rights and privileges. The usual techniques for performing these vital roles are 'questions answers,' 'adjournment motions,' 'cut motions,' etc. It employs what has been described as a process of 'ventilation of grievances' and 'extraction of information.' A democratic government must work in the public eye and not in secrecy. These techniques are used to preserve these vital aspects of parliamentary democracy.

Judged by these criteria, the role of the first parliament of Bangladesh was simply disappointing. The questions raised by the members were few and scattered; adjournment motions were also few and ineffective. This was mainly because there was hardly any opposition party. It was, in a real sense, a one-party parliament dominated by one man. As a commentator has nicely pointed out: 'Mujib was himself the Awami League Party.'[27] He could also probably have added that Mujib was not only the Awami League Party, he was also the political order himself. Mujib's autocratic style of party managment was never questioned by the party as it was with Edward Heath or Margaret Thatcher in England. Both lost the party leadership due to their autocratic style, after losing the confidence of the Conservative MPs. Unless the ruling party adheres to democratic rule, and unless the legislature plays an effective role, the decline or demise of the process is bound to come sooner or later.

The most important and effective way to check the executive in a cabinet system is the existence of a well organized opposition party. There is no denying that a cabinet system prevents concentration of powers in the hands of one man, but the cabinet itself becomes the *de facto* sovereign by virtue of its legislative and executive authority. Such an executive contains the seeds of constitutional dictatorship if there is no effective opposition. The opposition's role is to scrutinize and to point out the excesses of the government. It also provides an alternative government for the people.

But in the first parliament of Mujib there was hardly any opposition. It was feeble and had no hope of winning the election. The government could thus take the House for granted. Mujib could always keep the House at bay thanks to his power to dissolve it. In the absence of an effective opposition Mujib,

whose authority was virtually unchallenged, turned the political order of Bangladesh into a one-man show but with all the trappings of a parliamentary government.

(ii) Political factors

At the cost of repetition, we shall state that a sound party system, preferably a two-party system, is needed for the smooth functioning of a parliamentary democracy. What were the political dynamics of Bangladesh in 1974-5? The Awami League, as pointed out earlier, was the dominating party with a dominating leader. It had no effective challenger or rival through the 1972-5 period as evidenced by the election results of 1973, though there were allegations of rigging and malpractices in that election. But making allowances for such real or alleged malpractices, there was no denying the fact that the Awami League with Mujib as its leader would win the 1973 election.

But the Party was weakened by factionalism, and a lack of sense of dedication and public service among its members. The members of the ruling party, including the family members of Mujib himself, were more interested in getting and dividing spoils after their victory in the liberation war. They did not pay proper attention to the serious socio-economic problems facing the country. On the contrary, it was alleged in many quarters that unethical practices such as smuggling across the Indian border were not only overlooked by the ruling party, but were actually encouraged by it. The result was the rise of radical political forces in the formation of Jatiyo Samajtantrik Dal and other groups who from the beginning were not at ease with a bourgeois party like the Awami League even during the liberation war itself. But as the days passed and the Awami League's failure and shortcomings became more and more evident, the influence of the radical forces began to rise in the Party in marked ways. The Awami League, in particular its supreme boss, Mujib, took the path of confrontation rather than searching the hearts and appreciating or understanding the forces which were bedeviling Bangladesh politics.[28]

The peoples' expectations during and following the liberation war were high. Mujib himself held out high hopes. He assured the Bengalis again and again that once Bangladesh was

established the peoples' aspirations would be fulfilled. But instead, the overall political and economic situation during the Mujib era could hardly give hope or encouragement to the suffering people of Bangladesh. This obviously led to widespread political discontentment. Mujib wanted to achieve the goals of a free and fair society by a particular strategy which may be described as outwardly socialistic, but in reality the system was still a bourgeois one. So the political conflict was not merely one of party differences as it is understood in a country like England or other older parliamentary democracies, the cleavages in Bangladesh moved beyond the realm of party differences to ideological differences. The scenario in 1972-3 was one of confusion, bewilderment, and frustration. In such a volatile and explosive situation, political agitation, upheavals, and unrest became quite frequent. One could even discern anomic tendencies in certain quarters such as in the *Sharbohara Party*.

Mujib was neither a talented nor a constructive administrator. As a leader of the Bangladesh movement he was successful, but as prime minister his role was disappointing. Instead of adopting democratic methods and techniques, he began to deal with the opposition forces in a dictatorial way. This led him to resort to measures such as preventive detention and emergency powers, which he had himself designated as 'black laws,' in order to deal with the growing political unrest, thereby undermining and weakening the democratic process and constitutionalism which he himself founded in 1972.

Nature also did not favour him. Natural calamities such as floods, which Bangladesh is quite often subjected to, occurred in 1974, in a damaging way. Far worse was a devastating famine in 1974, in which hundreds of thousands of people died. Death from starvation spread throughout the country, even in the capital city of Dhaka. This obviously created a highly untenable situation.

(iii) Socio-economic factors

Bangladesh from the beginning was confronted with serious socio-economic problems. No doubt the Mujib Government applied itself to tackling these problems. But Mujib's methods and techniques were far from satisfactory. His immature policy

of nationalization almost ruined the country's few nascent industries such as jute, tea and textiles. A Planning Commission headed by 'top' economists was formed with considerable fanfare. It was given more independent authority than was given to a similar commission in Pakistan. In Pakistan, the Planning Commission was headed by top bureaucrats. Bangladesh wanted to avoid this by giving almost unlimited autonomy to the Planning Commission. Again, the performance of this all-powerful and independent economic commission was disappointing.[29]

There was no dearth of external economic aid for Bangladesh, thanks to worldwide sympathy for the human suffering during the liberation war of 1971. There was a generous response to Bangladesh's appeal for foreign aid from capitalist, socialist and other countries. The amount of aid was larger than the aid received by united Pakistan immediately before the splitting up of the country.

The utilization of the foreign or external assistance was, however, not effective or fruitful. Unsatisfactory planning, lack of an economic infrastructure and, above all, widespread corruption among the ruling party led to large-scale misuse of foreign aid. This was another source of popular resentment and discontent. A small group of the urban elite grew richer and richer while poverty among the rural population continued to spread. The number of the landless rural also kept growing at an alarming rate.[30]

The result was an increasingly dangerous gap between a small urban elite and the vast majority of the rural population. The unemployment rate rose at an unacceptable rate. Popularity among students was one of Mujib's biggest assets. But he soon began to lose their unqualified 'love' and 'support' also.

(iv) Other factors

Apart from the constitutional, political and socio-economic factors, there were also one or two other factors during this period which created an explosive situation. One such element was the discontentment and alienation of the top bureaucrats. Bengali bureaucrats played a crucial role in the creation of Bangladesh similar to the way that Muslim bureaucrats in

undivided India played in the creation of Pakistan in 1947. Bangladeshi bureaucrats watched at close quarters the political role and domination of their counterparts in Pakistan. They probably had similar hopes and aspirations. But the Mujib regime did not satisfy the political ambitions of the bureaucrats. On the contrary, following independence, the bureaucracy, which was ridden with factionalism, was further shaken by certain policy measures such as Presidential Order No. 9 which enabled the government to dismiss any civil servant without any show cause notice. Certain developments, such as, undue interference by Awami League politicians and the 'ruling coterie' in the day-to-day administration and the creation of an all powerful Planning Commission, as stated earlier, alienated them. During the Pakistan era, the bureaucrats could control even the academicians through Ayub's 'black' University Ordinance, but by introducing a new ordinance giving autonomy to the universities and the creation of the University Grants Commission, Mujib curtailed their influence on the university campus. The vested interest groups were naturally alarmed by this move.

Another potential source of friction was Mujib's relationship with the armed forces of the country. It was widely believed that because of pressure from India as well as his reservations about the army's role, Mujib curtailed the army's strength in several ways such as by creating a para-military force, the *Rakhi Bahini*, and drastically reducing the allocation of funds for the armed forces. There was a real sense of grievance and discontent among army personnel against Mujib.

Towards one-party dictatorship

Confronted with unfavourable situations and challenges, Mujib began to think first, of curtailing and limiting the democratic process by introducing a series of undemocratic measures. Ironically, he started to take those measures soon after the parliamentary election in which his party had won a landslide victory.

On 23 September 1973, through the Second Amendment to the Constitution, he added the provision for preventive detention

which abridged the fundamental rights guaranteed by the Constitution and inserted a new section, Part IXA of the Constitution, arming the executive with emergency powers which, however, needed to be countersigned by the Prime Minister to be enforced. This step was taken in the context of the formation of the United Front (a conglomeration of about half a dozen opposition parties) in April 1973. In February 1974, he amended the *Jatiyo Rakhi Bahini* Ordinance giving the *Bahini* sweeping powers to deal with the so-called 'law and order' situation. In April 1974, the Special Powers Act was enacted, under which an individual could be held in detention for an unspecified period of time pending the review of his case. In the same month the newspaper Printing and Publication Act was passed with the objective of curtailing freedom of the press. Again in July, the Special Powers Act was amended to set up special tribunals which had the *locus standi* to hand down summary death sentences.

When he finally realized that even with a curtailed democratic process, he was unable to control the growing discontent and challenges to his authority, particularly when he realized that the myth of his popularity had begun to wane, he decided to take a more drastic step. It seems that his faith in the peoples' control or supremacy lasted only as long as he thought that people would be swayed by his dictate.

The preparation for such a drastic change started with the declaration of a state of emergency on 28 December 1974. The President, on the advice of the Prime Minister, used Article, 141A of the Constitution to declare a state of emergency and suspend all fundamental rights. The grounds for such action were the familiar rhetoric and accusations by the government against the so-called 'miscreants' and 'anti-social' elements, who according to the government were bent on destroying the state of Bangladesh. In reality, however, the government was preparing the way for a drastic change in the fundamental law of the country. The state of emergency was only a prelude, as the existing penal laws were enough to deal with the 'anti-state' activities of the radical elements.[31] Moreover, the Prime Minister with his unlimited powers could take action, if needed, even by abridging fundamental rights without imposing a state of emergency.[32]

What made Mujib take such drastic measures? He was known to be a centrist without any history of radical politics. His six-point programme was based on the interests of the middle class. The Awami League basically represented the interests of the urban middle class, rising industrialists and well-off peasantry of the rural areas. The system of government he established was, thus, a bourgeoisie liberal democracy with an aura of socialism. Why did he then switch to a system which was a total negation of all his political values and commitments?

Like any typical leader of the emergent nations of Africa and Asia, Mujib had, by 1974, dashed the people's hope of a healthy constitutional government. More often, constitutional governments in these countries are threatened not so much by the institutional framework laid down by the constitution but by the individual behaviour of politicians. The success of democracy in these countries does not only depend on the institutional framework, but, on what can be called the democratic spirit of the leadership. The leadership must demonstrate the spirit of toleration, self-restraint and mutual co-operation and compromise. Unfortunately, Mujib, by practising familiar tactics such as political coercion, undermining the freedom of press and assembly, and treatment of the opposition as anti-state elements, prepared the ground for a one-party state. When the basic characteristics of constitutional order, i.e., restraints limiting the government no longer worked, the leadership, in order to perpetuate its rule sought other devices and methods. By 1974, Mujib had exhausted all known political mechanisms and was now looking for new ways to remain in power. In order to do so, he reversed his political philosophy and the conviction on which he had based his political career. A new ideology was invented.

Mujib was, however, not the first leader of a developing nation to discard the western liberal model and opt for a one-party state. In the early 1960s, leaders of a number of newly independent nations of Africa and Asia turned their governments into one-party states in order to tackle gargantuan socio-ecnomic problems. In Ghana, Algeria, Tanzania, and Kenya one-party states were constitutionally instituted. Each of these leaders labelled the western parliamentary model as unsuitable for their needs. Sukarno of Indonesia called it 'free-flight

democracy.' They offered a new interpretation of democracy and socialism which they asserted could be achieved through a single-party system. Sukarno termed it 'guided democracy' or 'democracy with leadership.'

Julius Nyerere said that Tanzania's brand of democracy was a one-party democracy through discussion. The single party was to serve that purpose. It would serve as a link between the masses and the government. No opposition was to be tolerated because the party represented the popular will. Madeira Keita of Mali stated that, 'Democracy in its naively original sense is the exercise of public authority in conformity with the will of the masses.'[33] Not surprisingly, however, single-party governments tended to be a one-man rule. In the final analysis, the personalization of rule is an attempt to regain the legitimacy of the regime.

Unlike Julius Nyerere in Tanzania, Mujib, while declaring the need for a single-party system, did not claim that there was no class differentiation in Bangladesh and thus a multi-party system was not needed. His emphasis was more on the need to root out the 'wanton corruption' of the old regime which only a presidential form of government would be able to tackle. He saw the hidden hands of the 'Pakistan collaborators' and 'conspiracy' by 'foreign agents' which needed to be crushed by adopting a different variant of 'democracy.' His version of democracy was to be the 'democracy of the exploited' and 'socialism of the toiling masses' and its aim was to bring 'economic emancipation' to the exploited masses. In order to usher in such far-reaching changes, establishment of the 'democracy of the exploited' needed to brought about through a single-party system and the 'Father of the Nation' would deal with state affairs in simple and straightforward ways instead of through constitutional checks and balances.

Besides this elaborate ideological aura, other factors including the influence of Sheikh Moni, leader of the splinter Awami Jubo League as well as a nephew of Mujib's and one of his closest associates; the government's inability to contain the radical elements; the influence of pro-Soviet political parties like the National Awami Party (M) and Bangladesh Communist Party; and Mujib's own ambition for total state power, [34] are also cited for Mujib's change of heart. Mujib knew that his

system of government was faltering, the legitimacy and consensus of his Constitution achieved through the 1973 election was shattered, and he himself was losing his grip over the populace. Instead of compromise and negotiation, Mujib thought that concentration of powers in his person (as if he already did not have enough) could bring the situation under control.

Eventually, the plan for a one-party dictatorship was introduced at the Awami League Parliamentary Party meeting held on 19 January 1975. In the presence of the Awami League working committee, Sheikh Moni unfolded the doctrine of a one-party state, and the decision was taken to empower Mujib to take whatever steps necessary to tackle the burgeoning problems of the country.

A Constitutional Amendment Bill, the infamous Fourth Amendment to the 1972 Constitution, was introduced. A constitutional dictatorship was established which formally buried parliamentary democracy and the growth of constitutionalism in Bangladesh.

Mujib, thus, overnight transformed the democratic process he created by introducing an all-out form of one-party dictatorship. This was achieved by a so-called constitutional method: by a hastily introduced and approved amendment, the Fourth Amendment, Mujib brought the era of parliamentary democracy to an end. No discussion was allowed on the Bill, as the parliamentary procedures were changed just before the Bill was introduced, and within half an hour, the crucial amendment changing the basic structure of the Constitution was adopted. The way the Bill was adopted demonstrated the omnipotence of Sheikh Mujib's leadership.

The executive under the Fourth Amendment

The Fourth Amendment converted a parliamentary democracy to a constitutional one-party dictatorship in which all powers were concentrated in the presidency, thus virtually abolishing the two parts of the executive. The main stress was on the presidency as it dealt in detail with the mode of election, tenure of office, procedure of impeachment and removal, power of

appointments, relations with parliament, relations with the Council of Ministers, etc.

The president, instead of being indirectly elected by the members of parliament, as provided in the Second Schedule, was now to be directly elected.[35] The mode of election gave the office of the president greater stature and an independent source of power by virtue of holding the office independent of the legislature. Mujib was no longer the creature of parliament, it had made him the holder of independent power and authority.

The president was also the head of state and would take precedence over all other persons in the state.[36] An office of vice-president was created; the vice president was to be appointed by the president. In case of a vacancy in the presidency due to impeachment, removal or illness, the vice-president was to take over. The term of office of the president was five years.[37] But interestingly, there was no restriction on the tenure in office. In the original 1972 Constitution, the tenure of the president's office was for two terms. This provision was incorporated in the Constitution in order to curb the ambitions of the president. But under the Fourth Amendment the tenure was virtually for an unlimited period of time.

This feature became evident especially in the context of the procedures for impeachment and removal of the president. Under the original 1972 Constitution, such procedures were rather simple so that the president would be kept on guard regarding his constitutional duties. Under the new arrangements, a motion for the impeachment or removal of the president needed to be signed by two-thirds of the members of parliament instead of a simple majority, and in order to get the motion passed, it now required a three-fourths majority instead of two-thirds. So, once elected, an all-powerful president, created by the Fourth Amendment, could remain in office for life by manipulating election results through the one political party in the state, which he controlled. It was extremely difficult to remove him through consitutional mechanisms as the members of parliament would be only from his party. In case of vacancy of the office by resignation, death, or removal, an election was to be held within 180 days instead of 90 days.[38]

The executive authority of the president

The executive authority of the president under the Fourth Amendment was altogether changed. Under the parliamentary system, the executive authority was exercised by the prime minister in the president's name and he was to act on the advice of the prime minister. The original 1972 Constitution was vague about the actual location of executive authority, but it implied that it was with the prime minister.

Under the Fourth Amendment all executive authority was vested in the president and would be exercised directly by him.[39] A Council of Ministers to aid and advise the president[40] was created whose members, including the prime minister were to be appointed by the president at his discretion.[41] The president's discretionary power in this matter was such that he could appoint any member of his Council, including the prime minister, from outside parliament. This was justified in view of the dearth of experienced and qualified people, as such a provision would allow the president to recruit capable people. The Council would be presided over by the president[42] and would hold office during his pleasure.[43] One can easily discern the concentration of executive powers in the hands of the president. The advice of the Cabinet was not binding on him and he could hire and fire them in his own individual judgement without being accountable to parliament.

The president and the parliament

The former legislative and financial powers of the president acting on the advice of the prime minister, were turned into real power with the president exercising his individual judgement. He had the power to summon, prorogue and dissolve parliament. His rights to address parliament or send messages to parliament were retained. He could not, however, withhold the assent of any bill if passed in parliament by a majority vote for the second time. But an interesting amendment was made in Article 80 where the words or declares that he withholds assent therefrom' were inserted. The possible

explanation is that a parliament drawn from the one national party created by the president would dare not try to pass a bill for the second time under such circumstances. The factor of veiled threats to members who would have voted against the bill could not be ruled out.

With regards to the appointments of semi-judicial and non-political officials such as those of the Election Commission, the president now could act without the advice of the cabinet. Under the circumstances, the entire process of election became irrelevant when the election commissioner was to be appointed by such an omnipotent, partisan president. The unique and most disturbing feature was the power of the president with regard to the appointment and removal of the judges of the Supreme Court and the High Court. One of the fundamentals of constitutionalism is to ensure the independence of the judiciary and its separation from the executive so that its judgements are not flouted or influenced by the executive. The impartiality of the judiciary is also assured if the salaries of the judges are charged permanently on the Consolidated Revenue Fund and their appointments and removals are done impartially.

One of the fundamental principles of State Policy, Article 22, was to ensure that goal. Various constitutional mechanisms such as security and permanency, conditions for removal and salary, etc., were provided under the original 1972 Constitution to ensure the independence of the judiciary. But the Fourth Amendment, Article 96, which ensured the permanency of the judges, was amended and the president now could remove a judge on the grounds of 'misbehaviour' or 'incapacity' by simply giving him an opportunity to 'show cause.' Formerly a judge could only be removed by an order of the president pursuant to a resolution passed by a two-thirds majority in parliament. Article 96(3) provided that procedures relating to the removal resolution be regulated by parliament. Under the Fourth Amendment, Article 96(3), this provision was omitted. The president's authority to appoint other judges to the Supreme Court and the High Court was broadened as Article 98 was amended so that the 'consultation of the Chief Justice' required by the president to make such appointments was omitted. One can easily discern its psychological effects on judges as the

president's unlimited power of dismissal would surely keep them in line.

Several other Articles were also amended in order to concentrate all powers in the hands of the president. Article 116 was thus amended to entrust all powers to the president on appointment of persons exercising judicial functions, which were carried out formerly by the president on the recommendations of the Supreme Court and in consultation with the Public Service Commission and Supreme Court (done by the president in accordance with rules made by him on their behalf). The control and discipline of persons employed in the judicial service and the magistrate exercising judicial functions were vested in the president, as an amendment to Article 116. Similarly, Article 141A was amended with the clause (1) proviso which provided that such a Proclamation, i.e., the Proclamation of a State of Emergency, requiring the countersignature of the prime minister for its validity, being omitted. The president thus got undeterred powers to declare a state of emergency. Lastly, a special provision relating to the president provided for the immediate assumption of office by Mujib as president for a term under the amended Constitution and he was deemed to have been elected. The existing president, Mahmudullah, was not even given the chance to resign from office. This lack of formality regarding vacating the office of the presidency demonstrated the regime's intolerance and impatience.

This was further demonstrated by the way the Third Schedule regarding the administration of oath of office was amended. In the democracies of new states, as well as in the older democracies such as the United States, the oath of office of the president is administered by the Chief Justice of the Supreme Court. As the office of the Chief Justice of the Supreme Court is usually held in high esteem in most countries, it gives a special touch of formal, legal nicety to the event. Under the Fourth Amendment, the administration of the oath to the President was passed on to the speaker; whereas the administration of oath to the offices of the Speaker and the Deputy Speaker, was given to the president instead of the Chief Justice. The Speaker was readily available to swear in the President and the entire process was completed on the same day the

Bill was introduced. The rules of procedure were amended in order to facilitate its quick and smooth sailing.

To top off the concentration of powers of the president a new section, Part VIA, was added to the Constitution in which Article 117A empowered the president to create a single party, if needed, in order to give full effect to the fundamental principles of state policy set out in Part II of the Constitution. Once the president, by order, created such a national party, all political parties would stand dissolved.[44] The nomenclature, programme, membership, organization, discipline, finance, and functions of the national party were to be decided by presidential order.[45]

For the first time in the history of the subcontinent the individuals holding offices of public profit were allowed to join the national party. In fact the members of parliament were required to join the party and in failing to do so they were to lose their seats. Nobody could contest either parliamentary or presidential elections unless nominated by the party and nobody was allowed to take part in the activities unless a member of the national party.

The scheme of a single national party, according to some observers, was planned after the former Soviet model. The ultimate power of the state would reside with the party, which would have superiority over the government. It would serve as a link between the government and the people, bringing about a much-needed integration between the various segments of society. The state and the party being one would facilitate the necessary socio-economic development. Obviously, Mujib and his followers foresaw him in charge of both state power and the party. People were to elect their representatives from among three-fourths of the nominees of the party. The formation of the one-party state and concentration of all state power in the hands of one man thus negated all elements essential for a constitutional government.

Mujib formed the national party, namely, the Bangladesh Krishak Sramik Awami League (BAKSAL) on 24 February 1975, by exercising his constitutional power. Various political parties were either incorporated or outlawed outright. The party structure had a fifteen-member executive committee, which was the real decision-making body, below which stood a 115-member

central committee. The lowest tier of the party structure was the executive committee of five wings of BAKSAL. According to the Constitution of the party, Sheikh Mujib, who was the chairman of the executive committee, nominated the members of the various organizational tiers of the party.

In the meantime, on 26 March 1975, Mujib unfolded the socio-economic plan of the government. He also formulated policies for a major adminstrative plan. According to the new programme 65,000 villages were to be organized into compulsory multipurpose co-operatives. The co-operatives were to be formed on an idealistic vision of co-operation between the landed and the landless peasants, who would share scarce resources as well as increase the output for the benefit of the poor and the state. It was more a vision than a reality. Mujib perhaps was not aware of the fierce resistance by the 'kulaks' in the former Soviet Union during Stalin's brutal collectivization programme.

On the administrative plane, sixty subdivisions were to be upgraded into full-fledged districts, each headed by a hand-picked governor with a contingent of the *Rakhi Bahini* at his disposal. At both the district and *thana* level (a low-level administrative unit with a population of 80,000)—the adminstrative councils would consist of representatives from five fronts: peasants, workers, students, youth, and women. So the linchpin of Mujib's political order was the party, which was to bring unity among the different strata of society. The politicians, in such a case, were supposed to be non-partisan and were to do their best to serve the state. These far-reaching social and political programmes were called Mujib's Second Revolution, which envisaged selfless politicians and party workers working together under the direct leadership of the supreme leader, Sheikh Mujibur Rahman.

Ostensibly, the entire political order appeared oriented around the regime's attempts to shift the administrative weight to the countryside, by by-passing the urban middle class who were alleged to be the trouble-makers[46] (similar ideas were expressed by President Ayub in the 1960s), and endeavoured to bring about far-reaching socio-political changes which would tranform the country into a genuine socialist state. But a deeper analysis reveals that in the absence of a strong, ideologically-oriented Communist Party like that of the former Soviet Union (and

even there, the results were a dismal failure as evidenced by the collapse of the communist regime, followed by an acute economic crisis) the system had all the indications of being perverted into a system of patronage and a tool for suppression and oppression. Unlike the Communist Party, the BAKSAL Constitution did not have any provisions for democratic centralism, and thus was anything, but democratic. On the contrary, behind all the paraphernalia there was one central figure whose powers were so enormous that 'his political friends and admirers shudder at the dead weight of such concentration of power in an individual.'[47] In particular, Mujib's Second Revolution lost its weight when it was revealed that most of the fifteen members of the all-powerful Executive Committee, excepting one, were Mujib's close associates and relatives. Yet in theory, in guiding a revolution, the revolutionist is a doomed man. He has no personal interests, no affairs, sentiments, attachments, property, not even a name of his own...,[48] No wonder the people of Bangladesh were so sceptical about the outcome of Mujib's Second Revolution.

Second phase of experiment of democratic government in Bangladesh: an all-powerful presidency

The establishment of a one-party dictatorship by Mujib in 1975 caused widespread frustration and discontentment in the country. One particular segment of society—the army—was especially ripe for a revolutionary upheaval. We have already noted how Mujib alienated the Bangladesh army by his formation of a paramilitary force, the *Jatiyo Rakhi Bahini*, and by his attempts to reduce the strength and effectiveness of the armed forces.

Mujib's constitutional dictatorship lasted only a few months—25 January 1975 to 15 August 1975. It was overthrown by a bloody military coup in which Mujib and his entire family (with the exception of two of his daughters who were abroad), were assassinated. It would be an oversimplification to say that the army coup of 15 August 1975, was solely the result of the Fourth

Amendment. Intervention by the army was motivated by a number of factors. In our introductory chapter, we have given some analysis of the various factors behind military intervention in the newly independent Afro-Asian countries. In that connection we also referred to the potential threat of military intervention in Bangladesh. The last days of the Mujib era were noted for growing public discontent over the fast deteriorating economic conditions and the near-anarchic social order.

The army was particularly resentful of Mujib's alleged, or real, pro-Indian attitudes and policies. The younger groups of the Bangladesh army (one such group led by Colonel Faruk and Colonel Rashid actually led the 15 August *coup d'état*) seemed to be convinced that once Mujib's new one-party dictatorship was fully established in the country, there would be hardly any scope to remove him from power through the ballot. So, it seemed, they came to the conclusion that the bullet was the only available means to put an end to the Mujib regime.[49] The Bangladesh army, unlike Pakistan's, was divided into many factions and groups. It is still debated whether the *coup* of August 1975 had the support of a majority of the Banagladesh army or not, particularly of the high army officials such as generals or brigadiers. Perhaps the real story will never be disclosed fully.[50]

Whatever might be the origin of the *coup*, the first military *coup* of Bangladesh, in the early hours of 15 August 1975, was carried out in a rather successful way from the point of view of its makers. The *coup* was, however, followed by a period of total chaos and confusion as well as political uncertainty. A member of Mujib's Cabinet, Musthaq Ahmed, was called upon to assume governmental authority by the young Colonels and Majors responsible for the *coup*. Musthaq also formed an 18-member 'civilian' Cabinet, of which ten were members of the erstwhile Mujib Cabinet. The state ministerial positions were also dominated by the former state ministers of the Mujib era. A Revolutionary Council consisting of five Majors and some senior officials took care of national security. But nobody was sure where the real power lay in those days of instability and confusion. Guns and tanks were visible on the streets of Dhaka.

From 15 August to 3 November 1975, a state of uncertainty prevailed. Musthaq tried to conform to some sort of

constitutional order. He promulgated ordinances repealing the part of the Constitution that provided for one national party. On 3 October 1975, he announced that parliamentary democracy would be established as soon as possible. He also tried to convene the defunct National Assembly by meeting with the members informally although the country was still under martial law. Outside influences were also active and working, particularly in neighbouring India, which was most unhappy over the fate of its trusted ally, Mujib. Musthaq also sought to widen his diplomatic options by cultivating relations with China, and with Muslim countries such as Saudi Arabia and Pakistan. There were, therefore, raised eyebrows as well as welcoming signs in neighbouring countries.[51]

As a result of the prevailing constitutional and political instability Bangladesh was rocked by *coups* and *counter-coups*. On 3 November 1975, another military *coup* was attempted by allegedly pro-Indian elements of the army, which, however, did not last more that three days. Then on 7 November 1975, an army uprising, popularly known as the 'sepoy revolution,' took place. There was bitter and bloody fighting among the various factions and groups within the army.

Finally, the strongman of the Bangladesh army, Major-General Ziaur Rahman became the effective power-holder in the country. Zia was somewhat in the shadow during the Mujib era but Mushtaq made him Chief of Staff and promoted him to Major-General. Zia was a dedicated and honest man who had faith in the destiny of Bangladesh. Though Zia became the real power-holder he did not take over the presidency himself, which had passed to Chief Justice Mohammad Sayem during the short-lived coup of 3-7 November 1975. Zia's official status was one of the three deputy martial law adminstrators, Sayem being the Chief Martial Law Administrator. But Zia in the meantime began to exercise real authority and in due course, on 30 November 1976, Sayem was replaced by Zia as the Chief Martial Law Administrator and President through a proclamation. The Bangladesh army thus emerged as a powerful political force in the country following independence.

Thus began the second era of Bangladesh's constitutional and political history. Zia continued to rule under martial law from 30 November 1976 till April 1979. During this period,

Zia's main concern and attention seemed to be devoted to bringing political stability and to solving the country's basic economic needs and problems. Like most military leaders of Third World countries, Zia made the restoration of democracy his ultimate goal, but postponed parliamentary elections in view of the then prevailing situation, as his immediate and top priorities were the economic development of the country and the political integration of society. He was also anxious to put an end to the factionalism within the Bangladesh army and to develop a strong and united armed force. Constitutional matters and issues seemed to be set aside for the time being, though Zia never stopped discussing the country's constitutional shape and order with his close associates and outside experts.

The actions taken by Ziaur Rahman during the initial years of his rule (i.e., the last half of 1976 until the parliamentary election of 1979) were reminiscent of those taken in Pakistan under Ayub's martial law, 1958-62. But unlike Ayub[52], Zia had neither a specific plan for a political order in Bangladesh nor did he hold the politicians entirely responsible for the sorry state of affairs. He did, however, like Ayub, decide against having any specific constitutional formula; instead his efforts were directed at stabilizing the domestic situation. The single party system was abolished, political parties were revived and allowed 'indoor' activities, which needed government approval. The indications were that though in Zia's future political order political parties had a specific role, he wanted to keep them under control through martial law regulation No. XXII, 76, known as the Political Parties Regulation. A further amendment by another martial law regulation No.VIII, 1977, empowered the martial law administration to give approval to specific political parties, and ultimately twenty-one such parties were given approval. All signs indicated that if the politicians were to fail, General Zia could launch 'guided democracy.'[53]

Ziaur Rahman moved cautiously in the context of the prevailing uncertain political order and embittered relationship with India. First, on 23 April 1977 through a Presidential Ordinance he amended a number of provisions in the Constitution. The addition of the Muslim Prayer *Bismillah-Ar-Rahman-ar-Rahim,* before the preamble and the amendment of Article 6(2), defining a distinct identity helped

create a support base among the moderate elements of the country. Moreover, the replacement of 'socialism' (Article 8), with 'meaningful economic and social justice' attracted relevant sections of the population who were disenchanted with the results produced by Mujib's experiment with socialism. Secondly, by 1977, Zia had formulated a 19-point programme dealing with all aspects of the country's various problems: political, economic and social. He put the 19-point programme to the people through a referendum called, the Referendum Order, 1977. In the referendum, Zia's programme got a '98%' approval, which is the usual phenomenon of a referendum under a military regime. His role as Chief of Army Staff, however, continued to demonstrate the army's importance in the political affairs of the country.

Zia interpreted the approval of his 19-point programme as a mandate as it gave some form of legitimacy to his political authority. He now began to think seriously of providing a constitution, or bring about constitutional reforms for the country.

Mujib's one-party system had already gone. Political parties were revived. 'Indoor politics' had begun. Zia either directly or through his close civil and military advisers began dialogues and negotiations with various political groups.

The next important step by Zia was to hold a presidential election in June 1978. In order to implement his tailor-made system, Zia had, before the election, made sure that he was not debarred from contesting the election through the Second Proclamation Order No.II, 1978. The Ordinance proclaimed that 'the Chief Martial Law Administrator' will not be deemed to be holding an 'office of profit' of the Republic. The election was, however, contested by more than one candidate. Though there were several candidates, Zia's main opponent was Major-General Osmani, hero of the Bangladesh liberation war and leader of the Jatiyo Ganatantrik Dal. Zia won the election for a term of five years with 76% of the votes cast. After having legitimized his regime through the referendum and presidential election, he felt confident in bringing about further amendments to the Constitution.

In due course, it appeared from available sources that Zia became convinced that Bangladesh could not afford the luxury

of a parliamentary democracy. What Bangladesh needed, he felt, was a strong executive, though not absolutely dictatorial, to deal with the challenges facing the country in the socio-economic spheres. He wanted to have a synthesis between the political rights of the people and the urgent need for rapid economic development in Bangladesh. Zia felt that this could be achieved only under a strong executive and by neither a parliamentary system of the Westminster variety nor by a one-party dictatorship as introduced by Mujib before his regime came to an end.

Zia did not set up a new constituent assembly or anv other body to frame the country's future constitution. His *modus operandi* as the days passed, seemed to be direct consultancy and negotiations with party leaders, constitutional experts and such similar sources. By early 1977, Zia had some ideas, though not definite at that stage, about the country's future constitutional structure. Some are of opinion that Zia's model was somewhat nearer that of Ayub Khan of Pakistan whose 1962 Constitution could be described as a blend of democratic and authoritarian features. Ayub was also guided by his desire to have a strong and powerful executive and a legislature with restricted powers with regard to the relationship to the executive.

There were also speculations that the government was also considering the adoption of a French-style of government, with a directly elected president, a prime minister, cabinet ministers and an elected parliament. The exact role of the army in Zia's future constitution was also an issue of intense debate. He considered adopting certain clauses of the Turkish Constitution in which the army's role in times of political crisis has been spelled out.

The late President Ziaur Rahman had also toyed with the idea of adopting the Indonesian model before taking the final steps to establishing a democratic system in the country in late 1979. Zia reportedly sent representatives to Turkey and Indonesia to see whether either of their systems could be transplanted to Bangladesh.[53] Apparently he was convinced that the democratic forms of government that exist in industrially-advanced societies were unsuitable for a country like Bangladesh. However, after much deliberation Zia settled for a multi-party presidential form of government closer to the

French system than to the Indonesian or Turkish model. Zia, thus, took an important step through the Second Proclamation Order No.4, on 18 December 1978, known as the Fifteenth Amendment Order, which introduced constitutional reforms putting a formal end to Mujib's political order.

The Proclamation began with the words that the, 'President and CMLA in response to the popular demand to repeal the remaining undemocratic provisions, decided to bring about constitutional reforms in exercise of his mandate from the people.' He thus implemented a constitutional formula which brought changes in the original 1972 Constitution and introduced a modified presidential system. Before we discuss the exact nature of the executive under Zia's presidential system, let us discuss the relevant features of a genuine presidential system: (1) the president is directly elected for a period of time and he has a direct mandate from the people to perform his executive functions. The legislature is elected separately by a direct election; (2) once elected, he cannot be removed by a vote of no-confidence in the legislature. The constitution provides special provisions for his removal; (3) the legislature is directly elected for a fixed period of time and cannot be dissolved by the executive; (4) The legislature is the supreme law-making body and the executive has no power to interfere with the law-making function of the legislature excepting causing some delay; (5) constitutional provisions establish an independent judiciary whose responsibility is to interpret the laws and executive orders.

The US political order furnished the genuine form of a presidential system. It is based on the separation of powers and a careful arrangement of checks and balances. The framers of the US Constitution were particularly careful to ensure the prevention of too much concentration of powers in any one of the three organs of the government. The president's powers were supposed to be limited to the execution of laws passed by the Congress. But due to the emergence of various social, economic and political forces, the office of the American presidency has emerged as one of the most powerful executives of the twentieth century. He is the chief of state, chief executive, commander-in-chief, chief diplomat, and chief legislator. His powers and influence are immense, and as pointed out by

President Truman, 'They form an aggregate of power that would have made Caesar or Genghis Khan or Napoleon bite his nails with envy.'[54] But in reality no president can formulate or execute any policy whether foreign or national without the approval of the Congress. The Congress acts as a watch-dog over the president's powers whereas the latter prevents misuse of powers of the former by his veto power. The Congress is unable to remove him through a no-confidence motion, while the president has no power to dissolve it. The balance of powers in the system is further reinforced through the judicial review by an independent judiciary. Even though the Americans themselves look upon the office of the president with a certain ambivalence,[55] the American Congress is so powerful that President Woodrow Wilson termed it 'Congressional Government.'

A number of countries have experimented with the American model. C J Freidrich, analyzing the impact of American constitutionalism abroad, indicated that a number of countries, especially the newly independent Asian and African countries, are looking for a properly modified presidential system in the face of shaky parliamentary systems which are being perverted under different circumstances. But the presidential systems introduced in their countries are nowhere near the American system. Like the parliamentary one, this has also been perverted. In this respect, Freidrich cites the example of the Fifth Republic of France, which is not like the American presidential system. As he succinctly puts it: 'For a highly centralized system like the French, a presidential system raises problems which are quite alien to the American presidency.'[56]

The first encounter of the Bengalis with a presidential form of government was the one introduced by General Ayub Khan in 1962. Ayub, as pointed out earlier, had his own plan known as the Dorchester Hotel Plan of 1954. He was convinced that a parliamentary system of government was unsuitable for a country like Pakistan. In his speeches and writings Ayub made his dislike of parliamentary politics quite clear. He envisaged a highly centralized political system with a strong, effective and powerful executive unhampered by 'undue interferences' from the legislature. He rejected the Constitution Commission's recommendations of a presidential system modeled after the American presidency with sufficiently strong federal and

provincial assemblies to check the executive. His notion of a strong executive was put into a constitutional charter by Manzoor Qadir (Ayub's law minister) in 1962. He created a strong executive at the expense of the legislature. His legislative veto was most effective, as he had the power to send any Bill for a national referendum even after its being passed by the National Assembly by a two-third vote (Article 27). Unlike an American president, he did not share power with regards to the appointment of ministers. His ministers were handpicked, and the provincial governors were his agents. In case of a disagreement between a minister and his secretary, the matter was to be laid before the governor for final analysis, which clearly undermined the authority of the ministers and demonstrated Ayub's dependence on the civil-military bureaucracy. At the national level, cases of differences between a minister and his secretary, would be referred to the president, who would make the final decision. His term of office was fixed and impeachment procedures were complicated, making his removal almost impossible. The traditional rights of the legislature to control finance was tampered with and shared by the president. The legislature was allowed to vote only on new expenditures in the budget. He could declare an Emergency if he was satisfied that a grave emergency existed in the country and could rule the country by decrees and ordinances.

With regards to centre-province relations, the provincial administrations were brought under the control of the central administration. The most important factor was Article 131 which empowered the central government to legislate for the whole of Pakistan whenever 'national interests' of the country so required.[57] It was, therefore, not surprising that the Bengalis were extra-sensitive to the idea of a presidential form of government.

There are, of course, other types of presidential governments. The Fifth Republic of France is a case in point. France has had a long history of parliamentary politics. Both under the Third (1870-1934) and Fourth Republics (1946-58) the country was ruled by a parliamentary government modelled after the British Westminster variety. They were, however, more like the classical British parliamentary system as existed in the late nineteenth century, i.e., they were government by assembly. Under the

circumstances there was extreme cabinet instability in France. On the average, during the Third Republic there were eighty-eight ministries, none lasting longer than two years, whereas during the same period, Britain had eighteen ministries lasting an average of three and a half years. During the Fourth Republic similar scenes were repeated. The frantic search for a stable and effective executive resulted in the inauguration of the Fifth Republic in 1958.

The Fifth Republic of France is a curious mixture of presidential and parliamentary systems. In the 1958 Constitution, the executive-legislative relations remained ambiguous. It was a presidential system operating through the familiar parliamentary device. Under normal circumstances the prime minister and his cabinet 'determine and direct the policy.' (Article 21). The president's policy-making powers concerned external matters. The prime minister and his cabinet are collectively responsible to parliament, which is directly elected. Except that the ministers are not drawn from the legislature, all devices conform with a parliamentary regime. But given an emergency or a constitutional deadlock the powers of the French president assume a different dimension. Article 16 empowers the president to declare an emergency only after consulting the prime minister, Speakers of the two chambers and the constitutional council, and take any measures deemed necessary to deal with 'grave and immediate' dangers to the state. He then embodies the national will. The parliament, however, automatically meets to monitor his actions and cannot be dissolved. This power can also be constitutionally withheld if he is challenged by the prime minister who has a majority in the lower house. So, his emergency power is not unequivocal. The president's powers as arbitrator are laid down in Articles 5,11,12 and 64. The office of the president, which transformed in such ways that the president could act as the guardian of the Constitution, national territories and international commitments and as a neutral and impartial observer standing above political strife. He was, as such, given the power to call a referendum at the government's request on constitutional bills or treaties, dissolve parliament after consulting the prime minister and Speakers of the two Chambers. Attempts were thus made to bring a balance in the executive-legislative

relationship. But in the actual functioning of the constitution, the power of the legislature had been rationalized at the expense of presidential powers. Subsequently, by making the office of the president a directly-elected office, thereby giving him a direct mandate to perform his executive functions and reducing the status of the cabinet to that of merely a consultative body, the president has emerged as the key power-holder in France. (The cabinet does not act as a collective decision-making body.) It is also somewhat irrelevant that the cabinet is collectively responsible to the lower house for policies not formulated by the cabinet but by the president. The system in France is presidential without question, and the president holds more power than the American president. As pointed out by Friedrich, 'The prime drafter of the constitution of the Fifth Republic, Michael Debre, preferred the British system, which de Gaulle has perverted by widening the presidential powers until they formally exceeded those of the American president, being less limited by the preventative Assembly, and not at all by either federal or judicially enforced constitutional restraints.'[58]

The Republic has, in its turn, served as a model for its former African colonies. The Constitution of Ghana (1960), for example introduced a mixed version or a synthesis of the presidential and parliamentary systems. The constitution provided for the direct election of both the president and the legislature. But the office of the president was made the cornerstone of the constitution through various devices to control the legislature. The method of election, the president's legislative veto power, ministers being drawn from the legislature, and non-responsibility of the president and the ministers, all helped to create an all-powerful president.

Another example of a combination of a presidential and parliamentary system is the amended 1973 Constitution of Pakistan. Pakistan, after the autocratic rule of Ayub and Yahya, like a thesis after an anti-thesis, opted for parliamentary government. Bhutto's quest for personal power resulted in the concentration of all powers in the office of the prime minister. When General Ziaul Haq seized power in 1977, he sought to modify the constitution in order to bring a balance between the office of the prime minister and that of the president. Through the Eigth Amendment of the Constitution in 1985,

he increased the powers of the president. Articles 58, 48, 90, 91, 56, 243, and 75 were amended in order to broaden the president's powers. Executive authority is now vested with the president, and he can exercise a wide range of powers, including appointment of non-controversial but important officers like the Election Commissioner, and the Public Service Commissioner at his discretion, similar to the powers enjoyed by the president under the 1956 Constitution. The president has been given limited legislative veto power and the right to address the Assembly on his own initiative. He can dissolve the National Assembly and thereby prime minister is automatically dismissed. Recently this power was challenged in the Supreme Court which declared it unconstitutional making the situation more complex. The president can override the representative body and refer a Bill of national importance to a referendum. The political order of Pakistan, as such, is again back to a presidential system, in spite of having the parliamentary trappings of a cabinet headed by a prime minister.

Ziaur Rahman, as pointed out earlier, had started a dialogue with various political leaders about the future constitutional structure of the country. Since he was also the chief of army, he remained in close touch with his army associates. These contacts with the army ensured the acceptance of any future political set-up by the army. Constitutional issues were not openly discussed in view of the prevailing martial law in the country. But, as pointed out earlier, he was aware that large sections of Bengali intellectuals, the urban middle class, lawyers and politicians were sceptical of the presidential form of government. One of the main reasons for Mujib's downfall was the introduction of one-party presidential government in 1975. As one observer pointed out, 'The last straw came when Mujib imposed one-party rule, discarded the parliamentary system and replaced it with a curious amalgam of an American-style presidential structure with Soviet-style party cadres. Basically, it was intended to strengthen one-man rule and was bitterly resented by the people who for three generations had fought for their rights of democratic expression.'[59] The majority of the people in Bangladesh are particularly wary of the presidential form of government, especially if the office of the presidency

is held by the military. To a large section of the population it means a one-man show. Parliamentary government is synonymous with democracy, whereas presidential government spells autocracy. That a genuine presidential form of government like the American presidential system also can provide democracy is unknown to many. These misgivings about presidential government are the result of the historical experience of the Bengalis. Memories were still fresh of the time when Ayub introduced his autocratic rule under the garb of a presidential form of government and deprived the Bengalis of their democratic rights.

At the same time, Zia felt, as pointed out earlier, that an effective and strong executive less restrained by a representative assembly was what Bangladesh needed in order to establish a stable political order. The need for a stable political order was more urgent in the context of the gargantuan socio-economic problems facing the country, even if it meant a curtailment of some democratic rights. The idea of a strong executive was more acceptable to the military, an institution known for order, discipline, and hierarchy. Nothing can be achieved if there is no order, and order can only be established when it comes in the form of command, rather than through the amalgamation of various opinions. This idea also appealed to the emerging business class.

On the civilian front, Zia consulted Justice Sattar who was his special adviser, and Masihur Rahman, leader of the pro-Peking National Awami Party. General Nurul Islam, and General Mohabbat Jan Chowdhury were his military confidants. He also had extensive discussions with constitutional experts from outside the country. His decision to retain the presidential system was confirmed when he contested, and won a presidential election in June 1978. After thorough discussions with the relevant people he took steps through the Second Proclamation Order, No 4 on 18 December 1978, known as the Fifteenth Amendment Order, which introduced constitutional reforms putting a formal end to Mujib's political order. The amendment did not change the fundamental structure of the Constitution as amended under the Fourth Amendment, but modified and somewhat liberalized the nature of the political order of Bangladesh. The main objective was to modify

executive-legislative relations in order to bring a more democratic but effective political order. The proclamations began with the words that: 'The President and Chief Martial Law Administrator in response to the popular demand to repeal the remaining undemocratic provision, decided to bring constitutional reforms in exercise of his mandate from the people in the election to the office of President.' This was done also in accordance with the pledge made through the Third Proclamation of 29 November 1976, read with the Proclamation of 20 August 1975, and 8 November 1975.

The executive-legislative relations created under the Fourth Amendment were modified, although most executive powers were retained. The executive authority was still vested in the president, who was directly elected by the people for a period of five years albeit without a limit to the number of terms in office. He was the commander-in-chief of the armed forces, chief executive and chief legislative initiator through his power to address parliament and power of its dissolution. He was to make important appointments like that of vice-president, for a term of five years (he could be removed only by the president), and important but non-controversial appointments such as for members of the Election Commission whose neutrality were crucial in maintaining and conducting free and fair elections, and members of the Public Service Commission. National and international policies were to be formulated by him to be laid before parliament for its approval. Once elected he was likely to remain in office, as the powers of parliament to impeach or remove the president were adequately restricted.

Ziaur Rahman also did not repeal any of the extraordinary constitutional devices through which the president was capable of exercising almost dictatorial powers. The president was armed with emergency powers and preventive detention, as well as the special powers act. According to emergency provisions the president, if satisfied that a 'grave emergency existed' threatening the 'security or economic life of Bangladesh,' was entitled to declare a state of emergency during which period through Articles 36, 38, 39, 40 and 42, all fundamental rights would be abolished and state power would be restricted. The High Court was forbidden even to issue a writ of *habeas corpus* during the emergency period.

Resort to emergency provisions, especially among the new or emergent nations, is quite common. When a society is in flux and traditional authority has been undermined but has not been replaced by an effective administration, the rulers' exigencies of emergency powers are not without precedents. Most constitutions are armed with such provisions so that in a grave situation which cannot be brought under control within the framework of limited government the executive can act effectively. The Weimar Constitution of 1919 resorted to it when the nation was confronted with a civil war-like situation between the left and right-wing extremists. It is considered a political necessity against forces detrimental to constitutional government. As K C Wheare pointed out, 'A first force which works against constitutional government is war. In time of war or rumours of war, the government claims full freedom of action; it does not want to be bound by the limited government which we call constitutional.'[60] It is, then, not difficult to understand why in Great Britain the parliament delegated sweeping powers, including that of preventive detention to the government under the Defence of the Realm Acts. The constitution of the United States does not provide for such measures but the government has used them in times of emergency.

The debate is over how and why these sweeping powers are used. Both in Britain and France, the parliament is automatically convened by right and remains in session throughout the emergency. Unfortunately, in many emergent nations emergency powers of the president are independent of parliament and as such have been used even during normal times. In Bangladesh, the president's emergency powers are not independent of parliament but a president with a weak representative assembly is capable of using this power in an unfettered manner. These emergency powers in Bangladesh, have been misused both during Mujib's and Ershad's period. Ziaur Rahman, however, after the civilianization of his rule did not use this extra-constitutional power frequently but nonetheless it remained a powerful weapon to deactivate the opposition.

Another undemocratic provision known as preventive detention, which was incorporated in the original 1972 Constitution, was kept intact. Under this Act, an individual

could be detained without trial on the basis of suspicion that he may be involved in subversive activities. Such an act grieviously violated the democratic spirit. Originally introduced by the British under the Defence Act of India 1939, preventive detention is, unfortunately, needed by governments of most emergent nations in order to preserve responsible and representative government. Again, like emergency power, why and how it is used is the main issue. If it is used without restraints there can be serious abridgement of fundamental rights and threats to constitutional government. The democratic constitution of India contains such provisions. But the Indian Government has used this power with utmost restraint. It has been used 'primarily as a psychological deterrent in the fight against subversive activities throughout India'.[61] In Bangladesh, however, such provisions were used quite frequently by the presidents for self-aggrandizement purposes. Similarly, the Special Powers Act was also retained.

The proclamation further amended Article 58 under the Fourth Amendment in the following manner: (1) there shall be a Council of Ministers consisting of a prime minister, one or more deputy prime ministers and other ministers to aid and advise the president in the exercise of functions; (2) the question whether any, and if so what, advice was tendered by the Council of Ministers or a minister to the president shall not be inquired into in any court; (3) the president shall appoint as prime minister the member of parliament who appears to him to command the support of the majority of the members of parliament; (4) the president shall appoint the deputy prime minister and ministers from among the members of parliament or from among persons qualified for election as such members, provided that not more than one-fifth of their number shall be chosen from among persons qualified for election as members of parliament; (5) the ministers shall hold office during the pleasure of the president; (6) the president shall preside over the meetings of the Council of Ministers or may direct the vice-president or the prime minister to preside at such meetings; (7) a minister may give his resignation in writing to the president.

The Council of Ministers under the Fifth Amendment contained some of the features of a parliamentary government. There was

a provision for choosing a prime minister, who, according to parliamentary convention, appeared to have the majority. Choosing a prime minister by the president was subject to his absolute discretion under the Fourth Amendment (Article 58,3). Under the modified form, though it appeared to be left to parliamentary convention, the president had enough elbow room in the appointment of a prime minister. In this respect in the amended Constitution of 1973 of Pakistan, the president's powers are more restricted, as the nominee is required to get a vote of confidence from the National Assembly within sixty days, and before taking oath (Article 90,3.). The nominated premier under the Fifth Republic of France and the German Chancellor under the Basic Law, 1949, are also required to demonstrate that they do indeed command the majority of the legislature. Appointment of a prime minister by a neutral and indirectly elected president is altogether different from the procedure followed under a partisan and directly elected president. Thus, although the familiar parliamentary provisions of Council of Ministers headed by a prime minister were incorporated, Zia's cabinet, in view of the president's powers and influence, was more like a presidential cabinet than a parliamentary one.

Article 58 (3) under the Fourth Amendment was modified to make the cabinet more representative. The Fourth Amendment provided that the president could appoint ministers who were not members of the assembly, if deemed necessary. Non-members could speak and take part in the proceedings of the assembly but could not vote. Nonetheless, it widened presidential powers with regard to the appointment of the cabinet to such an extent that it deviated from a genuine presidential system. Under the modified form, no more than one-fifth of the cabinet was to be chosen from among the non-members of parliament. The appointment of ministers from among the non-parliamentary members was, however, justified in that it enabled the government to utilize the service of technocrats. In most developing countries, there is a shortage of capable and skilled persons. From that point of view such a provision was a positive addition, but it was somewhat of an abridgement of the parliamentary system. It was more akin to the features found in the Ayubian Constitution of 1962, and in that of the Fifth Republic of France.

Two other provisions were also fundamentally different from those of a parliamentary system. The Council of Ministers was to be presided over by the president (Article 58,6) and they were to hold office during the pleasure of the president (Article 58,5). In effect, then, the Council of Ministers did not have any decision-making powers but was merely a deliberative and consultative body like that of the Fifth Republic. By not making it collectively responsible to the legislature, as is found in both the Constitution of the Fifth Republic and in the amended 1973 Constitution of Pakistan (Article 90,4), the members of the Council of Ministers were nothing but the president's agents masquerading as a Westminster-type cabinet. They were not responsible to parliament even for the day-to-day administration since the parliament could not bring down the cabinet through a vote of no confidence. Neither the president nor the Council of Ministers were, thus, responsible to parliament.

The president's power with regard to money matters was also increased through the Fifth Amendment which undermined parliament's traditional control over the purse of the government. A legislature's unfettered control over government expenditure has been the surest way to restrict the powers of the executive. This holds true under both the presidential and the parliamentary systems. Especially in a presidential system, the legislature can be overzealous in protecting budgetary rights in order to check an independent executive. The financial power of the American Congress is a well-known phenomenon. But unfortunately, such a fundamental requirement of constitutional government was tampered with, initially, by the political leaders of Pakistan. Governor-General Ghulam Mohammed, who was known for his contempt of the democratic process, tried to formulate a synthesis of the American and British systems. The draft constitution prepared by Sir Ivor Jennings in 1955 introduced a novel idea: a strong executive whose powers would limit the powers of the representative body by encroaching on its traditional financial powers. Accordingly, if the national assembly failed to pass an appropriation bill before the beginning of the financial year the president could by certification, with some limitation, continue the government in operation for that financial year.[62] President Ayub under the 1962 Constitution had financial powers over the legislature.

The National Assembly of Pakistan was allowed to debate the vote only on that part of the appropriation bill which required new expenditure.[63]

The insertion of Article 92.A armed the president with financial powers through which he could control the parliament. It provided authorization of expenditure in case parliament 'failed to make the grants' (Article 89) and pass the law (Article 90), before the period expired for which grants in advance were made under Article 92 or 'has returned or reduced the demands for grants' or a request of the president for reconsideration 'the President may, by order, authorize withdrawal from the Consolidated Fund Moneys to meet the necessary expenditure in the annual financial statement for that year.'[64] The president, could, however, run his administration through his power of certification for no more than one hundred and twenty days. Within this time limit, the president could easily, either through coercion or persuasion, bring the legislative assembly in line to get the budget passed. This was a serious abridgement of the practice of constitutionalism. Insertion of Article 142, 1(A) provided the referendum process which allowed the executive to bypass parliament and directly appeal to the electorate on critical constitutional issues. As for treaties with foreign countries, which were to be laid before parliament for their approval the president now acquired the right to decide which ones were not to be laid before parliament for the sake of national interest (Article 145 A). For such vital interests Zia was assured that his judgement would be superior to that of the peoples' representatives.

In the final analysis, Ziaur Rahman's political order emerged as a presidential system with a strong executive. It was certainly not a parliamentary system, as the practice of overriding prime ministerial advice, lack of collective responsibility to the legislature, and restricted financial powers of the legislature all undermined the parliamentary system and favoured presidential leadership. A number of supporters of Ziaur Rahman have tried to compare his ammendments with that of the Fifth Republic of France. The Fifth Republic, originally constituting a hybrid of presidential and parliamentary systems, eventually emerged as a presidential system. There are some similarities between the Fifth Republic and the Constitution

of Bangladesh as amended under the Fifth Amendment. But in view of the unfettered constitutional and extra-constitutional powers of the executive, Ziaur Rahman's presidency was much more powerful than the president of the Fifth Republic of France. The executive created under the Fifth Amendment bore more similarities to that of the executive created under the 1962 Constitution of Pakistan. Like Ayub, Ziaur Rahman was motivated by a strong desire for national consolidation, economic development and the need for a strong executive. But the choice of opting for an overriding executive leadership at the cost of a weak representative body contained the seeds of constitutional autocracy. All that was needed was a twist in the electoral process of the country, which was fully utilized by General Ershad in subsequent years.

The executive under General Ershad

Ziaur Rahman's rule suddenly ended on 31 May 1981, in an attempted *coup*, creating a serious power vacuum in the country. There were apprehensions about the viability of the country's infant political system in case the army decided to take power. The army had a steady and continually increasing role in managing the political affairs of the country since August 1975. The militaristic nature of Zia's rule was removed following the parliamentary election and lifting of martial law in 1979, but even during his civilian rule the real power base remained with the army. Zia never pretended that his political system, the Bangladesh Nationalist Party, which was his vehicle, and the National Assembly, were fully-fledged democratic ones. 'We have to build democracy in this country,'[65] he used to say. His political system was based on a civil-military bureaucracy in which the army's political role was assured.

Contrary to the apprehensions the transition to civilian administration after Zia's death was rather smooth. Martial law was not imposed and no army personnel seen in the streets. The country was simply put under a state of emergency. The constitution was quickly amended (Sixth Amendment) to pave the way for Justice Sattar, the acting president, to contest the presidential election held in November 1981. The Chief of Army

Staff, General Ershad, excepting for a controversial interview with *Holiday*, a national weekly, in which he expressed the army's apprehensions about the presidential election being won by the Awami League, stuck to his support for the continuation of the constitutional process. He, however, quickly clarified this statement and categorically stated that 'he did not himself seek power, and the army did not want to govern.'[66] It should be pointed out that the army supported the Bangladesh Nationalist Party (BNP) and played a crucial role in winning the election for Justice Sattar. The real drama began to unfold after the BNP had won the election. Within three days of his victory, President Sattar was confronted with the 'bitter realities of power in his country.'[67] On 18 November 1981, a group of generals went to the president's office and demanded 'a share of power without responsibility,' while President Sattar declared that 'the army's job is to defend the frontier. No other role is possible for the army in a democratic country.'[68]

The Army Chief, General Ershad, told Indian reporters on 12 November 1981, that the army did not want any civilian responsibility but he made it clear that: 'What we want is that we must be heard. The government must take our views into consideration.'[69] Ershad's concept of the army having a share in the country's political affairs was expressed when he bluntly said that the army's role must be institutionalized.

During this period, November 1981 to 24 March 1982, President Sattar and the General had a series of discussions to explore ways and means of having some sort of military-civilian partnership modelled on the Turkish and Indonesian systems. At one stage, it was speculated that Ershad wanted to be the vice-president without, however, giving up his position as Chief of Army Staff, which was unacceptable to the civilian President Sattar. In the meantime, President Sattar in order to accommodate the army's demand, set up a National Security Council (NSC) consisting of the President, Vice-President, Prime Minister and the three Chiefs of Staff. There was no definite or clear-cut role for the NSC. In some quarters, it was thought to be a kind of 'super cabinet' but in reality it was not that powerful. We may add here that in Pakistan, President Ziaul Haq had also tried to set up an NSC but the National Assembly had turned down Zia's proposal.

Sattar's half-hearted measures, however, could not satisfy the army's desire for effective power-sharing. Ershad came to the conclusion, which he had candidly admitted, that, 'we considered Zia, who was an army man, would look after our interests. But he was also a president. Zia knew our needs. Obviously Sattar (if he was elected) won't have the same knowledge.'[70] Naturally, therefore, it was up to the generals themselves to ensure the army's role in the political system of the country. As such, the top Generals used to meet regularly at Ershad's official residence to discuss the fast-changing political dynamics of the country. In fact, they were making preparations for a military take-over. The usual allegations of corruption and inefficiency against the civilian cabinet of President Sattar used to be aired at these meeting. To meet the allegations of corruption, President Sattar changed his cabinet from a larger unweildy one into a twelve-member cabinet. But very soon it became clear that the army's appetite for power could not be satisfied unless Sattar was removed from power by a military *coup*.

During this period (December 1981) Sattar reportedly told a visiting constitutional expert who was pleading with him to arrive at a compromise and avert the impending imposition of martial law: 'How can I avert martial law? Ershad wants to be a military president and also perhaps, in due course, wants to be assassinated.'[71] In any case, it became clear before the end of 1981, that Bangladesh was heading towards another period of army rule and martial law. Thus began a new era of constitutional development in Bangladesh.

The *coup* came after a series of meetings with top generals and it was not an unexpected one. It was more of a praetorian, type, in view of the almost non-existent resistance from the political institutions of the country. For example, in spite of Sajeda Chowdhury's (an Awami League MP) recent claim in the Fifth Parliament that she had handed over a letter supporting Sattar's constitutional government,[72] activities of the Awami League had indicated its tacit approval of the *coup*.

Soon after coming to power Ershad gave definite assurances to his army colleagues on 24 March 1982, that he would introduce necessary changes in the constitution by which the army would be given some role in the country's political order.

He even suggested that in order to ensure effective sharing of power by the armed forces, the Constitution should have specific provisions for military participation in the government.[73]

He was looking for a model like that of the Indonesian and Turkish constitutions. In the constitutions of these two countries the army has a constitutional role in the political system. Thus, Ershad sent a secret two-man team to Indonesia to study what is known as the 'dual role' of the army in the Indonesian political system.

In Indonesia his process was started by President Suharto soon after he came to power in a military coup in 1966. After the parliamentary election of 5 June 1971, 75 out of 460 seats of the Assembly were given to the armed forces. The Indonesian army also, through an elaborate process, makes an active contribution to development activities.

Ershad wanted similar provisions in the Constitution of Bangladesh. He proposed a bicameral legislature whose upper house would have a one-third representation from the army, through a system of election guaranteeing the army's representation. At a meeting of his inner Council consisting of the top generals, Ershad presented a written constitutional proposal outlining his idea of army representation, but curiously enough a majority of his junta thought that such a proposal would certainly not be acceptable to the people of Bangladesh.

Ershad, then, decided to follow a process similar to the one introduced by his predecessor, Zia, to civilianize his rule. He declared himself the president of the country on 11 December 1983, held a referendum, formed his own political party, and tried to hold a presidential election before calling parliamentary election. But unlike Zia, who was successful in achieving a centrist consensus, Ershad's attempts were looked upon by the opposition with suspicion. The opposition suspected that by holding presidential elections he was trying to consolidate his power, and would then amend the Constitution to ensure the continuing dominance of the army; as such they refused to hold a dialogue with him. Eventually, a parliamentary election was held in 1986, followed by a presidential election.

Subsequently, President Ershad tried once more to institutionalize the army's role. He introduced an amendment in the Assembly to give army representation in the District Council, but there was such an uproar by the opposition that he had to drop the plan, although he never gave up the idea altogether.

As regards to the type of executive, Ershad found Zia's all-powerful presidency with a rubber-stamp legislature most suitable for his authoritarian rule. He ruled Bangladesh for about nine years without making any major constitutional amendments, unlike his two predecessors, Sheikh Mujibur Rahman and Ziaur Rahman.

Ershad's disservice to constitutional government in Bangladesh was not through the introduction of any new type of authoritarian executive rule, as he already had a ready-made one under Zia's executive system. But his disservice to democracy was that he destroyed the electoral process in the country. Under him the election process in Bangladesh became a total farce and a mockery. He ruled the country without holding any meaningful elections, without which no form of democratic executive can function.

Through unprecedented electoral malpractice, he kept parliament in line, creating an all-powerful and autocratic executive. As a matter of fact the Ninth Amendment, which was allegedly introduced to further 'democratize' the system, generated more scepticism than enthusiasm. Article 51(2) was amended to make the president's unspecified term of office into a fixed two-terms; whereas according to the amended Article 49, instead of the president nominating the vice-president, the vice-president was to be directly elected as a running mate of the president. Curiously, Article 51,A(2) which specified the fixed two-terms of office for both president and vice-president, made it clear that such provisions would not debar the incumbent president and vice-president from contesting the election. Under the circumstances and given the existing electoral system, both President Ershad and Vice-President Moudud were assured of fresh chances of office for two consecutive terms. The executive now bore more resemblance to that of the US, but in the absence of a powerful and independent legislature, which acts like a 'watch-dog,' the existing 'constraints' on the

executive were nothing but a charade. This point became clearer as a new clause, 72,4(A), was added which stipulated that 'if any contingency as mentioned in Article 53(3) arises at any time when the parliament stands dissolved or is not in session, it shall notwithstanding anything contained in this constitution, stand summoned to meet at the Parliament House at noon on the day following the day on which such contingency arises and the Parliament so summoned to meet shall stand prorogued or dissolved as before, as the case may be, after it has made necessary provisions for the discharge of the functions of the President.' Such a provision, under the existing circumstances made it easier for the president to maintain unconstitutional rule under the garb of constitutional government. Some Bangladesh Nationalist Party leaders even filed cases in the High Court against this Article.

Bangladesh entered a new era of constitutional development with the downfall of President Ershad on 6 December 1991. Although he was the longest serving ruler in Bangladesh since independence, he had difficulties legitimizing his rule. His hand-picked political party and fraudulent parliamentary elections of 1986 and 1988 and presidential election of 1987 were looked upon as attempts to apply a democratic veneer in order to continue his autocratic rule. Unlike Zia, he lacked personal popularity and the continuance of his rule depended on army support. The opposition was fragmented and the two main opposition parties, the Bangladesh Nationalist Party led by Zia's widow, Begum Khaleda Zia, and the Awami League led by Sheikh Hasina, daughter of Sheikh Mujibur Rahman, failed to forge a common platform and create a momentum.

In November 1987, however, Ershad's rule was seriously challenged by the opposition, but Ershad managed to survive using the familiar devices common to Third World countries, such as, the proclamation of a state of emergency and the suspension of fundamental rights. He was, however, compelled to dissolve parliament, but he had to, according to the Constitution, call an election within ninety days. The parliamentary election of March 1988 was a watershed in Ershad's rule. In the face of a mass boycott by the major opposition parties, the government resorted to such unprecedented election

manipulation that a British newspaper openly termed it as 'lies and cheating in the Dhaka poll booth.'[74]

The political turbulence continued and came to a head in November 1990. The three main alliances (seven-party alliance, eight-party alliance, five party alliance) and the Jamaat-i-Islami bridged their differences in order to unseat Ershad. One of the main issues was to decide whether Bangladesh would have a parliamentary system or a presidential system. In November 1990, all three alliances forged a common platform and came to a historic joint decision, declaring their intention of establishing a sovereign parliament and demanding free and fair elections under a neutral caretaker government. As usual Ershad responded with familiar tactics, declaring a state of emergency, suspending fundamental rights, etc., but the democratic movement gained momentum. Finally, when the army, whose area commanders and top Generals held a meeting while Ershad anxiously waited for its outcome, decided to withdraw its support, the president had no other alternative but to resign. On 6 December 1990, he stepped down in favour of a caretaker neutral government headed by Chief Justice Shahabuddin.[75]

The constitutional lacuna was overcome through a cumbersome process. As the House could not be convened (shortage of time and the fact that most of the MPs were in hiding), Vice President Moudud first submitted his resignation to the president, who appointed Chief Justice Shahabuddin as the vice-president and then tendered his own resignation to the vice-president. The vice-president then took over the office of the presidency, as acting president. A peaceful transition to an interim government was thus made possible. There was, however, one problem: finding ways and means for the return of the acting president to his former office. Before agreeing to head the caretaker government, Justice Shahabuddin had extracted a promise from the three alliances that after the transfer of powers to a duly elected civilian government, he would be allowed to assume his office as Chief Justice. The caretaker government's main task was to hold a free and fair parliamentary election and if required, a presidential one.

A free and fair election took place in Bangladesh on 28 February 1991. One of the main issues of the election was to

choose the form of government. The Awami League wanted a mandate from the electorate in favour of the parliamentary form, whereas the Bangladesh Nationalist Party remained mostly evasive on that issue, except for a few sketchy statements by Begum Zia about her party's preference for a presidential form of government, somewhat like the one left behind by her late husband and practised by Ershad for the previous nine years.

The election result was, however, startling. Belying its organizational strength, the Bangladesh Nationalist Party emerged with the single largest majority by bagging 140 seats out of 300, whereas the Awami League captured 88 seats only, but the Bangladesh Nationalist Party was still not in a position to form the government as it lacked the required 151 seats. After hectic lobbying by many, including some officials both military and civil, an uneasy partnership was formed between the Jamaat-i-Islami and the Bangladesh Nationalist Party. Begum Zia was then able to form the government as the acting president did not lose time forming a cabinet based on the consent of the legislature. Subsequently, the indirect election of 30 women members by the Members of Parliament took place. According to the agreement of its coalition with the Jamaat (decided on 12 March 1991), only one panel of the Bangladesh Nationalist Party candidates took part and won all 30 seats. The *quid pro quo* with the Jamaat was not fully implemented except for allotting two women's seats to the Jamaat, but Bangladesh Nationalist Party emerged as the majority party on its own strength.

Having settled down with a majority, the Bangladesh Nationalist Party was now confronted with the constitutional issue which had been plaguing the country since Ershad took power in 1982. It became a very delicate dilemma for the Bangladesh Nationalist Party and its leader Khaleda Zia to justify the system of government against which she agitated during the rule of Ershad. The Awami League, Five-Party Alliances as well as the Jamaat-i-Islami all wanted to switch over to a parliamentary system in order to prevent future autocratic rule in the country. Whereas the Bangladesh Nationalist Party was toying with the idea of introducing a genuine presidential system, with checks and balances, in order to ensure a democratic but effective executive. As such, for a short period

of time, the correct interpretation of a sovereign parliament became an issue of intense debate.[76]

The parliament, under the Zia-Ershad Constitution, was in many ways subservient to the executive and as such not sovereign. The Awami League and other political parties emphasized that the accountability of the executive to the representative legislature was synonymous with the sovereignty of parliament. From a purely theoretical point of view, the latter explanation is incorrect, as there can be a sovereignty of parliament without the executive being responsible to it. The legal status of the US Congress is a case in point. But since accountability of the executive to parliament was a part of the Joint Declaration, the Bangladesh Nationalist Party was accused of going back on its agreement. In fact, the Awami League and other political parties interpreted the sovereign parliament feature as synonymous with a parliamentary system, since it is one of the fundamental characteristics of the Westminster-type of government.

So the Awami League, during the first session of the Fifth Jatiyo Sangsad, which met in March and lasted 41 days, notified the Constitution's Eleventh Amendment Bill on 14 April. The Bill stipulated the validation of the tenure of the acting president and ways and means of his return to the Bench, as well as provisions to switch over to a parliamentary form of government as existed before the Fourth Amendment. Still undecided, the Bangladesh Nationalist Party agreed to form a Private Members Bill Scrutiny Committee to examine the technical aspects of the Bill. The first session prorogued without having settled the most fundamental issue confronting the nation. The country was thus caught in a fluid situation.

Throughout April, the Bangladesh Nationalist Party dragged its feet. Begum Zia was aware that a majority of the Bengali intelligentsia, urban middle class, lawyers, small traders and businessmen were in favour of a parliamentary form of government. A presidential form of government, supposed to ensure an effective and stable executive, was preferred by the civil-military bureaucrats and big industrialists. The quick and effective decisions needed for a stable political order and industrialization were not possible, according to these groups, under a parliamentary system.

The issue came to a head on 6 June 1991 when the Acting President, Justice Shahabuddin, in a nation-wide broadcast reminded the three alliances about their commitments and responsibilities. The Acting President, whose integrity as head of the caretaker government was beyond doubt, had already urged parliament members to resolve the constitutional issue in his inaugural address. The fluid situation was further exacerbated when the Prime Minister reacted angrily to the speculations of a cabinet dissolution. She was confronted with the reality that although her government was a *de facto* government, the Acting President still held the constitutional and legal powers of an all-powerful executive. The widening gap between the prime minister and the Acting President was, however, bridged due to the intervention of the Chief of Army Staff, General Nooruddin. The decision to opt for a parliamentary government was taken on the night of 7 June 1991, after Begum Zia had an extended meeting with her 'kitchen cabinet.' The final decision was taken on 8 June 1991, at the meeting of the Bangladesh Nationalist Party's Central Committee. The parliamentary party of the Bangladesh Nationalist Party also gave their concurrence for a switch-over on 9 June 1991, and formed a committee to draft an amendment bill featuring, parliamentary form of government with restricted provisions for floor-crossing to ensure a stable government. Given the history of Bangladesh Nationalist Party's defection, Begum Zia's eagerness to incorporate such restrictive provisions was quite understandable.

The following reasons, thus, can be attributed to Begum Zia's change of mind regarding the form of government: (1) demand by all opposition parties except the Freedom Party and Jatiyo Party; (2) demand by a large section of the rank and file within her own party; (3) the bleak chances of winning the presidential election because of the strong opposition from the Awami League, as well as, the entire *ulema* (religious scholars), (being a woman, it would have been difficult for her to be elected against the stiff opposition of the religious community as well as the Awami League); (4) realization that Ershad was still a force to be reckoned with, a fact, which became obvious during her tour of the countryside after the cyclone of 30 April 1991.

Accordingly, two Bills, the Constitution (Eleventh Amen-

dment) Bill, 1991, and the Constitution (Twelfth Amendment) Bill 1991, were introduced in Parliament by the government on 2 July 1991. The former sought to ratify and confirm all Acts, and actions taken by Justice Shahabuddin as Acting President and the exercise and performance of powers and functions of the President by him since his appointment on 6 December 1990, and to pave the way for his return to his former office, an assurance, given to him by the three alliances. The latter contained provisions for the change of government. The Opposition Amendment Bill was introduced on 4 July 1991, through a Private Member's Bill by the Deputy Leader of the House, Abdus Samad Azad. There were some misgivings about the numbering of the Opposition Bill, as Sheikh Hasina claimed that the Awami League's amendment Bill for a switch-over to a parliamentary form of government was notified earlier. The issue was, however, settled by terming it simply as Constitutional (Amendment) Bill, 1991. The provisions regarding the Acting President were incorporated in the same Bill. The provisions were similar to those of the Bangladesh Nationalist Party's Bill excepting the language.

The Bills introduced to change the form of government by the Treasury and the Opposition were remarkably similar. From the Preamble to Article 10 the language was the same. The Bangladesh Nationalist Party Bill proposed changes in Articles 11.48, 49, 50, 51, 53, 54, 55, 56, 57, 58, 59, 60, 70, 72, 73A, 88, 109, 112, 119, 123, 124, 125, 141A, 141C, 142, 147, 148 and 152. The Opposition agreed on the amendment proposals, except it did not propose amendments to Articles 70, 109, 125, 141. It, however, proposed amendments to Articles 92A and 145A on which the Bangladesh Nationalist Party's Bill was silent. Excepting those six Articles both agreed on the other proposed amendments.

Four other single-clause Bills were introduced in Parliament by the Workers' Party leader, Rashed Khan Memon, seeking effective participation by the people through their elected representatives in administrations at all levels, laying of all treaties with foreign countries connected with national security before a secret session of parliament, and ensuring fundamental rights as guaranteed in the Constitution.

As pointed out earlier, the Bills presented by the Bangladesh

Nationalist Party and the Awami League were remarkably similar regarding the form of the government, excepting: (1) the authority for conducting presidential election; (2) the provision for referendum regarding certain changes in the Constitution; (3) the power of the president to dissolve parliament; (4) restrictions on floor-crossing and (5) appointment of non-MPs as members of the Council of Ministers. In order to resolve the areas of difference, a 15-member committee comprising members from both the Treasury and the Opposition was formed on 9 July 1991. It worked for 18 days and had 36 meetings. Its fundamental objective was to work as a liaison committee between the Leader of the House and Leader of the Opposition. The committee finalized its report and came to a unanimous decision on 28 July 1991. This was an epoch-making event since both the major parties came to such a consensus in lawmaking through mutual give and take.

Let us now examine the various provisions which were amended through the then Select Committee's untiring efforts. Regarding the authority for conducting presidential election, the Awami League was in favour of reviving the Second Schedule in which the president was to be elected by the MPs, through a secret ballot, the process to be conducted by the Election Commissioner, whereas the Bangladesh Nationalist Party favoured the addition of the Fifth Schedule providing the authority to the Speaker through open ballot. In this regard the Awami League's proposed amendment provided one of the cardinal principles, i.e., to ensure the neutrality of the head of state of a parliamentary government. This is a well-established practice found in both old and new former dominions of Great Britain which adopted the parliamentary form of government. The use of discretionary powers by a neutral head of state is crucial in maintaining the purity of the system. The Bangladesh Nationalist Party's proposal obviously created an open invitation for the election of a partisan president. The Select Committee decided not to opt for any Schedule and to retain Article 119 of the existing Constitution. This was suggested by Moudud Ahmed of the Jatiyo Party which stipulated that the election of the president would be conducted by the election commissioner, but the procedure of the election was to be decided by enacting an ordinary law. Subsequently, a law was

enacted which stipulated that though the presidential election was to be conducted by the Election Commissioner, it was to be done through open ballot.

Secondly, the provisions of referendum regarding certain changes to the Constitution, the Awami League's Bill wanted to do away with the protective provisions by omitting Articles 141(1A), (1B) and (1) which according to the Awami League were undemocratic since they were inserted in the Constitution by the Second Proclamation Order No. IV of 1978, later ratified by the Fifth Amendment and had curtailed the sovereignty of the Parliament. But the Bangladesh Nationalist Party only dropped Articles 48, 56, 58 which dealt with the provisions regarding the executive, while retaining Article 8, which contained fundamental principles of State, policy and Articles 80,92A which upheld the sovereignty of the parliament in legislative matters. The government insisted that protective clauses, like the referendum clause, should be kept, in order to avoid any constitutional *coup* like that of 1975, which changed the fundamental character of the Constitution itself.

It should, however, be pointed out that from a strictly theoretical point of view the sovereignty of parliament is somewhat circumscribed if the constitutional provisions require participation of an outside body or bodies of a federation. But there are many examples, like the German Basic Law of 1949, which forbids Parliament from amending any of the Articles dealing with the provisions regarding territorial change of the federating units, the right of the 'Lander' to participate in legislation, the guarantee of human rights, and the status of Germany as a 'democratic and social state' (Article 79,3). The Constitution of the Fifth Republic of France also forbids Parliament from making any change in the republican form of government (Article 89) without holding a referendum first. As such, the Bangladesh Nationalist Party's argument for retaining such a provision was not without justification.

Article 141(c) provided for a referendum on certain protective clauses which under the amendment Bill were Articles 8, and 80. The Bangladesh Nationalist Party wanted to add a new sub-clause (1D) after Article 141(1C) which laid down that whatever the result of the referendum it should not be deemed a 'vote of confidence' or 'vote of no-confidence' for the executive.

Obviously, this sub-clause was offered with the intention of ensuring the continuity of the executive.

Finally, in a compromise formula, the Select Committee sought to protect only the Preamble (containing *Bismillah-ar-Rahman-er-Rahim)* and Article 80 through a guarantee clause. The government had earlier sought to protect Articles 80 and 92A under the guarantee clause. These two Articles empowered the president to return a Bill passed by parliament for reconsideration, and to withdraw money from the Consolidated Fund of the Republic for 60 days if parliament failed to make the grant. The Opposition felt that such clauses should be dropped to protect the parliamentary system which the Bills sought to establish.

The third point of difference was regarding the power of the president to dissolve parliament in case the prime minister loses the confidence of the majority members of the House. In a parliamentary government, an effective and stable executive is ensured through the power of dissolution. Usually, this power of dissolution is given to the president of the Republic at his discretion. But as pointed out earlier, this discretionary power of the president was grossly misused during the Pakistan period which created cabinet instability. With regards to the authority of dissolution, the Awami League revived some provisions found in the 1972 Constitution laying down the usual parliamentary procedure which enables the president to dissolve the House in accordance with well-established traditions and conventions of the parliamentary system as it exists in UK and India. It should be pointed out that while both in UK, and India this procedure was left to convention, in Bangladesh, under the 1972 Constitution, a provision was added which stipulated that if the prime minister after losing the majority in the House or for any other reason requested the president to dissolve the House, he was bound to do so. The Bangladesh Nationalist Party wanted to go one step further and wanted to ensure that if the prime minister under such circumstances made a request to the president in writing, the president was not to have any choice, but would have to accede to the prime minister's advice. Thus, the president having no discretion in the matter of dissolving the House, the prime minister under the circumstances could have draconian powers over the members

of parliament. The Select Committee, therefore, rearranged the provisions for dissolving the Assembly. The provisions provided that if the prime minister makes a request of dissolution after losing the confidence of the majority, the president would consider such a dissolution only after examining the possibility of forming an alternate cabinet. If the president finds there is no such alternative, he would dissolve parliament and call for fresh elections. Thus the present Constitution contains the conventional features of a parliamentary system as far as the powers of the president to dissolve the House are concerned.

The fourth difference of the Bangladesh Nationalist Party and the Awami League centred around the restriction of floor crossing. It is common wisdom that the success of the parliamentary system depends on a well-organized, well-disciplined party system. Throughout the Pakistan period, the institutionalization of a party system was retarded due to the interference of civil-military cliques. Frequent crossing of the floor was a common phenomenon which created cabinet instability during that period. As early as in 1972, Sheikh Mujib through a Presidential Order, called Constituent Assembly Members (Cessation of Membership), tried to take care of such a phenomenon. As pointed out earlier, according to this order if a member of the Constituent Assembly resigned or was expelled from the party which nominated him to the election, he was to automatically lose his seat in the Assembly. Even Sheikh Mujib, who was the undisputed leader of millions of Bengalis with a total number of 427 out of 430 seats, thought it necessary to promulgate such an ordinance, an ordinance which made the Constituent Assembly subservient to the ruling party. This was justified on the grounds of maintaining party discipline. Such is the nature of parliamentary politics in a Third World country like Bangladesh.

Subsequently, a similar provision was incorporated in Article 70 of the 1972 Constitution which provided that a member was to lose his seat in Parliament if he resigned or voted against the party which nominated him to the election, but he was not debarred from contesting the subsequent parliamentary election. Originally, Article 70 was substituted by Act II of 1975 which interpreted voting against the party as being synonymous with abstaining. The Amendment Bill of the Awami League

kept Article 70 intact and considered it enough restriction against floor-crossing.

The Bangladesh Nationalist Party's proposed amendment of Article 70 was more restrictive and authoritarian. It stipulated that a member would lose his seat if the leader of the party informed the Election Commission in writing of the fact that he has resigned, has been expelled, or acted and voted in parliament against the party, or formed any group with other members within the party which nominated him to the election. Abstaining from voting or absenting himself from any sitting of parliament, or ignoring the direction of the party were also to be considered as voting against the party through sub-clause (2) the BNP wanted to add further restrictions in the form of punitive punishment debarring a member whose seat had fallen vacant from contesting parliamentary elections for five years. In order to prevent defection or group floor-crossing, sub-clause (3) provided that if at any time groups were formed by the members of a party, the matter would be referred to the Speaker who would within seven days of the formation of such a group convene a meeting of all members of the affected party. The Speaker would then put the matter to a vote of the members of the party as to which group would represent the original party, and, the Speaker's decision based on such a vote, would be final.

We may ask why was the Bangladesh Nationalist Party so anxious to prevent the formation of a group within the party? If we look at the past history of this Party we find that it consists of defection by its members and the formation of groups such as the 'BNP (Huda)' and 'BNP (Obaed).' Begum Zia had bitter experiences of party defections and disintegration. So she was naturally anxious that such a phenomenon should not take place, particularly when her Party had become the ruling one and she was the Prime Minister. She was also aware of the recent political development in the neighbouring Indian Parliament when Chandra Shekhar, who belonged to Janata Party under V P Singh, defected from his party and formed a dissident group, which was successful in getting electoral support of Congress (I) and formed a new cabinet with Chandra Shekhar as prime minister. Obviously, Begum Zia did not want to see such a phenomenon in her party.

Lastly, it was provided that if an independent member was to decide, after being elected, to join a party, he would be deemed to be a member of that party.

While it was understandable that in a country like Bangladesh where party discipline is a rare phenomenon, provisions to check floor-crossing might have been an imperative but sub-clause(2) debarring a member whose seat has fallen vacant, from contesting the parliamentary election, was considered to be a violation of fundamental rights. The deputy leader of the House and member of the Select Committee reportedly said that martial law was preferable to the amendment regarding floor-crossing as proposed by the Bangladesh Nationalist Party.[77] A compromise formula was worked out by the Select Committee by omitting sub-clause (2) while retaining the other proposed amendments intact.

A point of difference between the Bangladesh Nationalist Party and the Awami League was regarding the appointment of non-members as Minsters of Council. The proposed amendment of Article 56(2) by the Bangladesh Nationalist Party favoured inclusion of no more than twenty per cent non-MPs in the Cabinet. The Awami League considered such a provision undemocratic and insisted that only Members of Parliament were eligible to be appointed as Cabinet Ministers. If any non-MPs were inducted as ministers, they must be elected to the House within six months of their appointments.

After much deliberation by the Select Committee the inclusion of non-MPs in the cabinet was reduced to ten per cent. It should be pointed out that appointment of non-MPs as cabinet ministers is not a complete violation of parliamentary principle. In the British parliamentary system which is considered to be the finest and purest, there is a well-established convention that a cabinet minister must be either a member of the House of Commons or of the Lords. But there have been exceptions. Sir Ivor Jennings pointed out that: 'It is a well-settled convention that these ministers should be either peers or members of the House of Commons. There have been occasional exceptions. Mr Gladstone once held office out of Parliament for nine months. The Scottish Law Officers sometimes, as in 1923 and 1924, were not in Parliament. General Smuts was minister without portfolio and member of the War Cabinet from 1896 until 1918. Mr Ramsay

MacDonald and Mr Malcolm MacDonald were members of the Cabinet though not in Parliament from the general election of November 1933 until early 1936. The House of Commons is, however, critical of such exceptions.'[78] In a country like Bangladesh where there is a scarcity of expertise, this was a step in the right direction. This provision enables the government, should it so want, to use the services of technocrats. As such the committee agreed to retain the provision. The percentage of such ministers allowed was reduced from twenty per cent to ten per cent but both sides agreed that it would help the government to recruit technocrats for the efficient running of the government.

The Select Committee accepted one of the Bills of Rashed Khan Menon regarding foreign treaties connected with national security laid under article 145A. Under the previous Constitution, the president could withhold the laying of any treaty before parliament which if so done, could be considered against national interest. According to the amended provision foreign treaties connected with national security would now be placed before a secret session of parliament.

Lastly, to fill the constitutional lacuna which would have been created as soon as the Constitution (Eleventh Amendment) Bill, 1991, was passed and became operational, as it was not subjected to any referendum, the Select Committee inserted a provision in the Awami League Bill that the Acting President would be returned to his former office after the election of a new president and the latter's entering in the office. The decision of the Select Committee was unanimous on this issue except Moudud Ahmed of Jatiyo Party, who thought that the return of Justice Shahab-uddin to his former office would affect the independence of judiciary.

Bangladesh's quest for a parliamentary form of government was fulfilled when both the 11th and 12th Amendment Bills were passed after brief deliberation in Parliament on 7 August 1991. The Awami League tried unsuccessfully to make the repeal of the Indemnity Ordinance of 1975, which blocked the trial of the killers of Sheikh Mujibur Rahman, a pre-condition to the passage of 11th and 12th Amendment Bills. But when the Acting President threatened to quit if the Bills were not passed within the specified time, the Awami League, in order to avoid

a political crisis, voted for the Bills *en masse*. Events moved quickly after that. The Referendum Bill on whether the president should assent or not to the Twelfth Bill was passed on 8 August 1991. The election of the President Bill providing for election through open ballot was adopted on 15 August amidst the Opposition's walkout. The referendum regarding the change of government provisions took place on 1 September and the presidential election was held on 4 October 1991 (i.e., within 180 days of the vacancy of the president's office). A new era of constitutional development had begun in Bangladesh.

The executive under the present constitution

The executive which emerged in Bangladesh as a result of the acceptance of the Twelfth Amendment is a parliamentary executive. It has retained all the features of a parliamentary system which we discussed earlier. But on a closer scrutiny it would be obvious that the system provides unusual powers to the position of the prime minister. It is true that in a parliamentary system a prime minister enjoys unique power and position as long as he or she has the control and confidence of the ruling party. Through personal contacts with his or her cabinet colleagues, junior ministers and back-bench MPs, a prime minister usually keeps command over the party. But if the party itself for some reason goes against the prime minister then his or her position becomes untenable. There are many instances where the prime minister has had to quit office when he/she lost the confidence of his or her own party. Prime Minister Bob Hawke of Australia had to quit his office after two terms as a result of a revolt in his party against him. Another instance is that of the 'Iron Lady' in England, Margaret Thatcher, quitting her office when she lost the confidence of her own party.

Bangladesh's Constitution sought to ensure the prime minister's dominance by providing constitutional measures which would not allow party members to vote against the prime minister in parliament by statutory provision. Therefore, what could happen in Australia or in England would not be possible in Bangladesh because of the punitive clauses against the members of parliament. Even if the members were to revolt

against the prime minister in their party meeting or outside parliament that would have no effect on the tenure of the prime minister as long as they did not vote formally in the legislature. And the present Constitution provides adequate provisions against voting in parliament itself. In this way the dominance of the prime minister is ensured. Lack of democratization within the political parties in Bangladesh makes this possibility even more formidable. We may add here that there were similar provisions in the original version of the 1972 Constitution as introduced by Mujib. Begum Zia further restricted the independence of the MPs by provisions against grouping within a party.

Further measures have been taken to ensure the dominance of the prime minister. The mode of election of the president has been made in such as way that unless a person is nominated and approved by the prime minister he or she cannot be elected president. Thus the scope for a neutral head of state is absent. A neutral head of state is regarded as one of the sound characteristics of the parliamentary system. The relationship between the prime minister and the president is not that of equals the president is almost a subordinate. As such, the power of dissolution of Parliament by the president under the present constitution becomes meaningless.

Similarly, the power to declare an emergency in the country depends entirely on the initiative of the prime minister, and the president would have no role in it but to accept the written wishes of the prime minister. This is comparable to the 1973 Constitution of Pakistan as introduced by Z A Bhutto where it was alleged that the division of powers between the president and the prime minister 'was ludicrous, meaningless and downright comic.'[79]

Mujib was so confident about his dominance both within his party and in parliament that there was no need for him to provide statutory provisions restricting the powers of the president. But it seems that Begum Zia had no such illusion about her hold either on the party or in parliament. This is the background of the present Constitution of Bangladesh providing for a strong executive. Finally, we may add that provisions for preventive detention and special powers Acts which have been in existence in Bangladesh since 1973-4 have

been kept intact. The position of the prime minister in Bangladesh today is almost as strong as it was under Mujib or under the 'military president.'

NOTES

1. *The Proclamation of Independence Order*, 10 April 1972.
2. Ahmed, Moudud, *Bangladesh: the Constitutional Quest For Autonomy*, (Dhaka: University Press Ltd., 1979).
3. Bagehot, Walter, *The English Constitution*, (Ithaca, New York: Comell University Press 1963).
4. Eulai, Heinz, *Journeys in Politics*, (New York: Bobb-Merrill Company Inc, 1963), p.130.
5. Pylee, M V, *Constitutional Government in India*, (New Delhi-Bombay: Asia Publishing House, 1977), p.375.
6. *The Provisional Constitution of Bangladesh Order*, 1972.
7. Talukdar, Maniruzzaman; *The Political Development: The Case of Pakistan, 1947-1958*, (Dacca: Green Book House, 1971).
8. *The Government of India Act, 1935*, as adopted in Pakistan under *The Indian Independence Act, 1947*.
9. Choudhury, G W, *Democracy in Pakistan*, (Vancouver, Canada: University of British Columbia, 1963).
10. Choudhury, G W, *Pakistan: Transition from Military to Civilian Rule*, (London: Scorpion Publishing Ltd, 1989).
11. Article 48(2) and (3), *Constitution of Pakistan, 1973*.
12. Article 48(5), *Constitution of Bangladesh, 1972*.
13. Rose, Richard, and Suleiman, Ezra, N, (ed.), *Presidents and Prime Ministers* (American Enterprise Institute for Public Policy Research, Washington, D.C., 1980), p.2.
14. Based on personal interview, 20 March 1992.
15. Article 57(2), *Constitution of Bangladesh, 1972*.
16. Sharma, Campbell, *'Constitutional Politics in Australia'* in Bogdanor, Vernon, (eds.), *Constitutions in Democratic Politics*, (Aldershot, England Gower Publishing Company Ltd., 1988).
17. Jennings, Sir Ivor, *Constitutional Problems in Pakistan*, (Cambridge: Cambridge University Press, 1956).
18. Pylee, M V, *Constitutional Government in India*, op.cit.
19. Article 56(3), *Constitution of Bangladesh, 1972*.
20. Article 56(1), op.cit.
21. Article 55(2), op.cit.
22. Article 5892), op.cit.
23. Article 57(2), op.cit.
24. Article 55(3), op.cit.
25. Dicey, A V, *The Laws of the Constitution*, (Indianapolis: Liberty Classics: reprint: originally published: 8th ed. London: Macmillan, 1915), p.285.

26. Bagehot, Walter, op-cit.
27. Ahmed, Moudud, *The Era of Sheikh Mujib* (Dhaka: University Press Ltd., 1980), p.234.
28. Talukder, Maniruzzaman, *'Bangladesh in 1974: Economic Crisis and Political Polarization'* in *Asian Survey*, Vol. XV, No. 2, February, 1975, pp.117-128.
29. For details, *see*, Ahmed, Moudud, *The Era of Sheikh Mujib*, op.cit; Jahan., Rounaq, *Bangladesh: Problems and Issues*, (Dhaka: University Press Ltd, 1987).
30. For details, see *The Annual Report of the World Bank.*
31. Ahmed, Moudud, *The Era of Sheikh Mujib*, op-cit.
32. Chowdhury, Abu, Sayeed, *'The Bangladesh Constitution in American perspective'* in Beer, Lawrence, and Ward, (eds.), *Constitutionalism in Asia: Asian View of the American Influence*, (Berkeley: University of California Press, 1979).
33. Sigmund, Paul E, *The Ideologies of the Developing Nations*, (New York: Praeger Publishers, 1963), p.176.
34. Talukdar, Maniruzzaman, *'Bangladesh in 1975: the Fall of Sheikh Mujib and its Aftermath'* in *Asian Survey*, Vol. XVI, No. 2, 1976.
35. Article 48(1), *Constitution of Bangladesh, 1972.*
36. Article 38(2), op.cit.
37. Article 57, op.cit.
38. Article 123, op.cit.
39. Article 56, op.cit.
40. Article 58, op.cit.
41. Article 58(3), op-cit.
42. Article 58(4), op.cit.
43. Article 58(5), op.cit.
44. Article 117A(2), op.cit.
45. Article 117 A(93), op.cit.
46. *Far Eastern Economic Review*, 16 May 1975.
47. Ahamed, Emajuddin, *'The August Coup of 1975'* in *Society and Politics* edited by Ahamed, Emajuddin, (Dhaka: University Press Ltd., 1989), p.161.
48. Quoted in Max Nomad, *Apostles of Revolution*, (Boston: little Brown, 1939), pp. 228-33.
49. Based on author's personal interview and discussion with the army officials involved in the coup.
50. For details, see, Mascaranus, Anthony, *The Legacy of Blood*, (Dhaka; University Press Ltd, 1886) and Lifswitch, Lawrence, *Bangladesh: The Unifinished Revolution*, (Zed Press 1979).
51. Choudhury, G W, *'Coup and Counter-Coup'*, ORBIS, Winter, 1976.
52. For details, see, Ahmed, Mushtaq, *The Government and Politics in Pakistan*, (Karachi: Space Publishers, 1979; and Sayeed, Khalid B, *The Political System in Pakistan*, (Boston: Little Brown Inc., 1967).
53. *The Times*, (London), 26 August 1976.
54. Rossitor, C L, *The American Presidency*, (Baltimore: The Hopkins University Press, 1987), p.16.
55. Pious, Richard M, *The American Presidency*, (New York: Basic Books Inc., Publishers, 1979).
56. Friedrich, C J, *The Impact of American Constitutionalism Abroad*, (Boston:

Boston University Press, 1967), p.16.

57. For details, see, Sayeed, Khalid B, *The Political System in Pakistan*, op.cit, Chapter 5; Jahan, Rounaq, *Pakistan: Failure of National Integration*, (New York: Columbia University Press. 1971), Chapter. 7; and Choudhury, G W, *Democracy in Pakistan*, op.cit, Chapter. VII; and Ahmed, Mushtaq., *The Government and Politics in Pakistan*, op.cit, Part. II.
58. Friedrich, C J, *The Impact of American Constitutionalism Abroad*, op.cit, p.20.
59. *Far Eastern Economic Review*, 17 August 1975.
60. Wheare, K C, *Modern Constitutions*, (London-New York-Toronto: Oxford University Press, reprint: 1952-1956), p.138.
61. Austin, Granville, *The Indian Constitution: Cornerstone of a Nation*, (Oxford: Clarendon Press, 1966), p.113.
62. Draft Constitution of Pakistan (1955), prepared by Sir Ivor Jennings cited in, Choudhury, G W, *Pakistan: Transition From Military to Civilian Rule*, (London: Scorpion Publishing Ltd., 1988), p.156.
63. Sayeed, Khalid B, *The Political System in Pakistan*, op-cit, p. 108.
64. Article. 92 A, *Constitution of Bangladesh, 1972*, as amended under Zia.
65. *The Times*, London, 17 November 1981.
66. *Ibid*, London, 18 January 1982.
67. *Far Eastern Economic Review*, 27 November 1981.
68. *Ibid*.
69. *Ibid*.
70. *Far Eastern Economic Review*, 2 October 1982.
71. Based on personal interview.
72. *Holidays*, 31 July 1991.
73. *Far Eastern Economic Review*, 27 August 1982.
74. *The Guardian (London)*, 4 March 1988.
75. Based on personal interview. According to this source, who was close to the president, Ershad phoned him repeatedly on that fateful afternoon expressing his anxiety over the outcome of the meeting which was to decide his fate. Eventually three area Commanders arrived at Sena Bhavan and communicated army's decision.
76. *The Bangladesh Observer (Dhaka)*, 24 March 1972.
77. *Dhaka Courier*, 26 July, 1 August 1991.
78. Jennings, Sir Ivor, *Cabinet Government*, reprint: 3rd edition, (Cambridge: Cambridge University Press, 1980), p.60.
79. See Choudhury, G W, Pakistan: *Transition from Military to Civilian Rule*, op.cit, p. 24.

The Legislature

Of all the three organizations of a modern state, namely the executive, judiciary, and legislature, the last one is regarded as the most important because it consists of the representatives of the entire population. As the central principle of representation is to secure a responsible government, the importance of the legislature can hardly be over-emphasized. Though its origin lies not 'in the legislation, nor even in the supply of finance' but in the King's need for 'some process, however rough and ready, by which he could obtain the consent, or at least the acquiescence, of the influential sections of the people to his acts of governance,'[1] it became increasingly identified with the law-making functions.[2] This aspect of the legislature was further strengthened when during the eighteenth century, the Americans, in their fight to safeguard their interests against the royal governors, emphasized the policy-making functions of the legislature. But basically the legislature remained identified with law-making function as the general idea was that the people's representatives should make the rules under which they would live.

There remain, however, two problems with the representative legislature. One concerns the relationship between the representative principle and the ideals of democracy and liberalism. There are instances when an executive may want to make a direct appeal to the people on a particular issue by passing the representative body. In such cases the executive may easily claim that their actions are more in line with liberal democracy as they put peoples' sovereignty over its representative body. The other problem is related to the location of boundary lines between the executive and the legislative spheres.[3] The latter issue poses a serious problem in present-day executive-legislative relations. The increasing responsibilities of

the State of the twentieth century calls for greater initiative and dynamism from the executive, which almost compels it to interfere in the legislative sphere. The line between the two spheres is, as a result, becoming blurred. This phenomenon has been termed by Lord Bryce as the 'decline of legislatures'.[4] After the glorious revolution of 1688, the powers and supremacy of the legislature were in ascendancy. But thanks to the changing role of the state, the executive's ascendancy has become more visible since the late nineteenth century. Sir Ramsay Muir, in his brilliant study of the British Parliament, has very candidly pointed out the ineffectiveness of the legislature in performing its designated role.[5] Although Sir Ramsay over-emphasized the decline of the British Parliament, there is no denying that the British Parliament, or the Mother Parliament's, role has changed in view of the emergence of an assertive, structured and well-disciplined party system in Great Britain and the consequent dominance of the executive. As Sir Ivor Jennings has pointed out, the 'transcendent and absolute' power of Parliament has now shifted in the hands of the Government and ultimate control on the executive is with the electorate or public opinion.[6] Similar trends were visible in West European countries where the emergence of well-disciplined parties gave rise to strong executives.

Another ominous development which affected the legislatures' decline was the rise of Nazism, Fascism, and finally totalitarianism. Under these systems, legislatures were turned into 'rubber stamp' legislatures which were nothing but 'parodies of deliberative bodies.'[7] In most newly-independent Third World countries, similar trends were discernible.

In spite of such developments, 'once the idea of direct popular government was rejected as impractical, representative assemblies were the only known device by which executives could be restrained (liberalism) and restrained on the basis of the peoples' will (democracy).'[8] The legislature has, thus, emerged as the symbol of liberalism and democracy though its functions and roles have undergone profound changes. As such, though there has been the recent trend towards a 'decline of parliament' and the rise of cabinet dictatorship, no one can deny or challenge the importance of the legislature, not only in the parliamentary system, but even in a presidential system

as it exists in the US. Today, Dicey's concept of a legislature, through which the people govern themselves, is somewhat tarnished, but in its new role, it provides the twin purpose of securing popular representation and government accountability. Through popular representation, it provides, on the one hand, conflicting interests with a platform for negotiation and compromise, and on the other hand, it provides a forum where the government's accountability is secured and its actions are evaluated. The legislature, in a modern state thus, engages itself not so much with the initiation of legislation as with the discharge of other highly important work, such as control over finance, extraction of information about the working of the executive branch of the government, and ventilation of public grievances. It uses various techniques and *modus operandi* to perform these non-law-making functions, such as adjournment motions, question and answer sessions, investigation by committees, etc. As such, in spite of its drawbacks the existence of a healthy and effective parliament has become the *sine qua non* of a constitutional government.

The genesis of the Legislative Council in the Indian subcontinent can be traced to the Indian Council Act of 1861, with the expansion of the Governor-Generals' Executive Council, in which some elements of Indian representation through nomination was ensured. The need for such representation was felt after the First War of Independence in 1857. Such Legislative Councils were in no way 'miniature parliaments' and their functions were strictly limited to legislation initiated by the executive.

An element of indirect election was introduced under the Act of 1892. The functions of the provincial assemblies were enlarged as these assemblies were allowed to discuss the annual statement of revenue and expenditure, but without, of course, voting rights. They also had some limited rights to address the executive. The concept of territorial representation was ruled out and there was no approach to a parliamentary system since an official majority was always kept intact. Subsequent constitutional reforms—the Acts of 1909, 1919, and 1935—broadened the functions and representation in the Legislative Councils, both at the centre and in the provinces. But it was not until the Act of 1919, that the British conceived the idea

of a responsible government or the method of direct election. It should, however, be pointed out that throughout the British period, the linchpin of Indian constitutionalism was the practice of constitutional autocracy, dating back to 1786, in which the powers and functions of the representative assemblies were circumscribed by an all powerful executive.[9] This phenomenon had far-reaching repercussions on the constitutional development of both India and Pakistan, especially Pakistan. Moreover, limited representation in these Legislative Councils further diminished their status and prestige. Full-fledged parliamentary government and the principle of the supremacy of parliament was established for the first time in India with the passage of the Indian Independence Act of 1947. Thus, British efforts to introduce some representative institutions after the popular uprising of 1857, which began by setting up Legislative Councils in a rudimentary form, finally culminated in the creation of two sovereign legislatures, one for India and the other for Pakistan when the British liquidated their empire in 1947. It is evident from the foregoing discussion that the growth of healthy and effective legislatures was retarded as long as British colonial interests needed to be protected in India. They, however, being the innovators of the parliamentary system in which the government's accountability was to be checked by an independent legislature, were quite aware of the necessity of having such an institution. The establishment of two sovereign parliaments through the passage of the Indian Independence Act of 1947, demonstrated their intentions. As a matter of fact, the institutional structures left behind by the British were truly parliamentary in nature, ensuring the sovereignty of parliament.

The Constituent Assembly in Pakistan, which was set up by the Act of 1947, had a special legal standing. It was entrusted not only with the task of framing a constitution for the country, but it was also to act as a parliament. The magnitude of its sovereignty was such that Quaid-i-Azam Mohammad Ali Jinnah, the Governor-General, had specified that its legislative acts were transformed automatically into legislation without the assent of the Governor-General. This was a clear deviation of parliamentary principle and not a pragmatic approach. But the development of such a phenomenon in a Muslim-majority country was hardly surprising since Muslims are known to

be more emotional than pragmatic. Another reason was the organizational structure of the Muslim League. The party had a weak institutional base and suffered from ill-discipline. Only the towering personality and popularity of the Quaid-i-Azam put life and breath into the party's activities. And since Jinnah was the President of the Constituent Assembly besides being the Governor-General (another deviation of parliamentary principle), it was assumed that parliament would not pass any law or act which would be looked upon unfavourably by Jinnah. This legacy was discernible during the post-independence era of Bangladesh. As mentioned earlier in our chapter on the executive, the 1972 Constitution was identified with Sheikh Mujib. Subsequent constitutional development in Bangladesh could also not break free from such impractical characteristics. One forgets that the constitution of a country is its supreme law which cannot and should not be altered so easily and which must function under various circumstances and various personalities. A constitution should reflect the hopes and aspirations of the country, as well as, socio-economic and political realities.

It was then not a surprise that the sovereign legislature working under the interim Constitution of Pakistan started facing rough weather soon after Jinnah's death. The decline of parliament began with Governor-General Ghulam Mohammed's misuse of his discretionary powers. The arbitrary dismissal of the Nazimuddin cabinet soon after the passage of the budget in 1953, and the dissolution of the 'sovereign' parliament in 1954, aptly demonstrated its impotency. The working of the legislature under the 1956 Constitution of Pakistan was also not impressive. It was adorned with all parliamentary trappings, and as such, had legal sovereign status. But thanks to institutional weaknesses, party factionalism, and interference by the Head of State, it soon degenerated into an arena jockeying for power. The dominance of the executive, thus, overshadowed the legislature. As G W Choudhury tersely says, even 'before being given a formal burial in October 1958 it (the legislature) had become a mere shadow.'[10]

The status of the legislature under Ayub's 1962 Constitution was even more pathetic. During 1956-8, the legislature, though weak, was nevertheless, able to exert some authority, but the

legislature under Ayub was nothing but an appendage of the executive. Unlike the independent legislature of the US presidential system, the president under the 1962 Constitution was an integral part of the legislature. Moreover, his most comprehensive and effective powers, i.e., the power to veto legislation, power of referendum, and above all, his financial powers over the budget, which in any system, whether parliamentary or presidential, is the prerogative of the legislature, restricted its functions and powers to such an extent that by all canons of definitions it had become the executive's domain. As a matter of fact since 1955, systematic efforts were made in Pakistan to curtail the legislature's independence so that the executive could function in an unfettered manner and, at times, even arbitrarily. The draft constitution, prepared by Sir Ivor Jennings for the Government of Pakistan in 1955, is a glaring example of such intentions of the constitution-makers of Pakistan.[11]

From the foregoing discussion, it is amply clear that like that of the British Raj, Pakistan's ruling elites were equally keen to circumscribe the powers of the people's representative body *vis-á-vis* the executive. Such a phenomenon emanated from the Pakistani leaders' deep-rooted distrust of the peoples' ability for self-rule.[12] Another factor, which was widely criticized in the then East Pakistan, was the apprehension of the West Pakistani ruling elites that an independent legislature, with majority representation from the Bengalis (on the basis of their numerical strength), would be a threat to the power elites which were composed mostly of West Pakistani bureaucrats and military officials.[13] Throughout the Pakistani era, the Bengalis pinned their hopes on the establishment of a sovereign parliament in which the government of the day would be accountable. Such a political order, according to the Bengali intelligentsia, could rectify the situation in which they suffered from acute economic deprivation and political domination.

Against the backdrop of this polarization which culminated in a full-fledged civil war between West Pakistan and the then East Pakistan, Bangladesh was born in blood and tears. After its birth, the Bengali leadership was eager to frame a constitution which enshrined the principle of supremacy of parliament—their long cherished dream. It was quite understandable why

the working of the legislature during the Pakistan era had made a profound impact on the minds of the Bengali intelligentsia who had spearheaded the Bangladesh independence movement in late 1960s. The commitment of the Awami League leadership was total in this respect. Mujib, in particular, being a populist leader, was eager to establish the peoples' supremacy to demonstrate his complete faith in their sovereignty. We shall note later how Mujib's faith in the peoples' assembly declined, and how he interpreted the sovereignty of the parliament. His cardinal mistake was that he thought that his will was synonymous with the will of the peoples' representative assembly. In the light of such political developments, let us now examine the legislature under the 1972 Constitution, first, its institutional organization, and second, its powers and functions *vis-á-vis* the executive.

Structure of parliament under the original constitution of 1972.

The Constituent Assembly of Bangladesh was formed in March 1972, through a Presidential Ordinance known as the 'Bangladesh Constituent Assembly Order.' The Constituent Assembly consisted of members of the National Assembly and the Provincial Assembly who were elected between December 1970 and 1 March 1971. This sovereign body was entrusted with the task of framing the Constitution of the Peoples' Republic of Bangladesh, but it was not to operate as a legislature. From the outset, the sovereignty of the Constituent Assembly was set on a wrong footing. Unlike the First Constituent Assembly of Pakistan, the sovereignty of the Constituent Assembly of Bangladesh had been circumscribed by another Presidential Order, namely the Constituent Assembly Members (Cessation of Membership) Order, which stipulated that if a member of the Constituent Assembly either resigned or was expelled from the party which nominated him to the election, his seat would be declared vacant. Since the Awami League had captured most of the National Assembly and Provincial Assembly seats in the elections of 1970 and 1971, the Constituent Assembly automatically became subservient to the ruling party.

A constitutional draft committee was formed during the first session of the Constituent Assembly and it proceeded with the framing of a sovereign constitution.

All legislative authority of the Republic was entrusted to Parliament, which is officially known as the Jatiyo Sangsad.[14] Article 65(2) stipulated that the Jatiyo Sangsad would consist of the President and one House. The issue of having a second chamber, whose principal function would be to put restraints on the working of the lower house (which is the real representative body), was not even discussed. A second chamber is an essential feature of a federal state, but it is also found in older Commonwealth countries. Bangladesh, being an unitary, homogenous, small and new country, opted for a unicameral legislature which was to represent the embodiment of the peoples' will.

Unlike the presidential system of the US, where separation of powers between the executive and the legislature exists, a parliamentary system calls for an intimate and inter-dependent relationship between the two. Since the president is the chief executive but at the same time a member of the legislature, he is a constituent part of the legislative process. As such the 'King in Parliament' has a special connotation in the Westminster-type government. Interestingly, in the 1972 Constitution of Bangladesh, the authority of the chief executive was neither with the president nor with the prime minister, but was kept deliberately vague, for reasons explained in our chapter on the executive; even so, the president was made an integral part of the legislative body consistent with a parliamentary system. He retained the right to address the first session of Parliament after an election, and could address and send messages for the House to discuss.

One of the intrinsic aspects of a sovereign parliament is the method of choosing representatives through direct elections on the basis of universal adult franchise. As such, the method of direct election provided was the election of the members from territorial constituencies. The House was to consist of 300 members, who had to be at least 25 years of age, citizens of Bangladesh, and voters, and who would be allowed to vote in *Sangsad*. A member was not allowed to represent two constituencies at the same time. The usual provisions for

disqualifying an individual were incorporated in the constitution. The most unusual disqualification was Article 66(2e) which debarred a person convicted of any offence under the Bangladesh Collaborators' (Special Tribunals) Order of 1972. This provision was incorporated in view of the situation arising out of the Bangladesh Liberation War of 1971. This particular provision was dropped by President Ziaur Rahman. Parliament was empowered to authorize the Election Commission on the issues of disqualification, and the Election Commission's decision on such matters was final.

In view of the backward situation of women in Bangladesh, fifteen additional seats were reserved for women who were elected by the members of the House. This provision was made for a period of ten years; women, however, were not debarred from contesting elections from general constituencies. A similar provision had been incorporated in the 1956 Constitution of Pakistan. G W Choudhury argued that under such a provision, women were granted double franchise. In reality, however, the situation was altogether different. Since fifteen women members were elected by the sitting MPs, the majority party was always assured of a solid block of fifteen seats. Women, under these circumstances, suffered disadvantages rather than any gain. They were merely puppets in the hands of their male colleagues and not concerned with women's issues. In addition, male candidates from the general constituency did not consider it necessary to feel the pulse of women voters. Subsequently, Ziaur Rahman raised the number of seats reserved for women to thirty. The time period for this provision was also extended to 15 years. Later President Ershad extended the period by yet another 10 years. Such trends only prove convenient for favouring the majority party in Parliament. The quorum was fixed at no less than sixty members present, and a decision by Parliament was to be taken by a majority of members present and voting (Article 75,1(b) & 2).

The Constituent Assembly of Bangladesh, however, was spared the vexing question of minority representation. The Constituent Assembly of India had to overcome various devices for communal and functional representation embodied in the Acts of 1919 and 1935. Similarly, the First and Second Constituent Assemblies of Pakistan had to deal with the vexing

issue of the quantum of representation from various units as well as of minority representation. The question of minority representation, however, was done away with in 1956. The Awami League was the champion of this abolition, with two objectives in mind: (i) making the parliamentary system free from any aberration called minority safeguard and (ii) presenting an united front *vis-á-vis* the West Pakistani ruling elite.

So no provision of minority representation or safeguard was incorporated in the 1972 Constitution of Bangladesh. This was a cardinal mistake since neither the Constituent Assembly nor the Constitution Draft Committee considered any provisions to safeguard the interests of the tribal population of Bangladesh, who are ethnically, religiously and culturally different from the rest of the population. Excepting the lone voice of the Chakma tribal leader Manobendra Larma, the Constituent Assembly members were silent on this issue[15] (which was to emerge later).

The usual provisions were incorporated in order to deal with the circumstances under which a member must vacate his seat. The most novel one was Article 70, which stipulated that if a member resigned or voted against the party which nominated him to the election, his seat would be declared vacant. He would, however, not be debarred from contesting the subsequent election. There is no doubt that this Article circumscribed the independence and free spirit of the individual MPs. There is also no denying that every MP wants to keep his seat and does not vote against the government under the party whip, which is the usual parliamentary practice. But his main concern is his constituency and he must keep in mind its interests. Only by keeping in touch with public opinion and propagating those views in Parliament can he expect to keep his seat and at the same time do his job best by keeping the government aware of popular feelings. It is true that in England and other older Commonwealth countries, thanks to the party discipline, MPs usually do not vote against their party but constitutionally they are not debarred from voting against the government, if necessary. It is almost a truism that the leader of the parliamentary party must feel the pulse of the back-benchers in order to make the parliamentary system work as well as to be in touch with public opinion. That important channel of

communication was blocked under Article 70 of the 1972 Constitution of Bangladesh. The provision was, however, incorporated into the Constitution due to the Awami League leaders' experience with party defections and changing party allegiance during the short-lived period of parliamentary democracy during 1956-8, which had caused acute political instability creating opportunities for army intervention.[16] An attempt was made to create a stable executive at the cost of the independence of the MPs. In the context of the existing party system in Bangladesh such a constitutional provision was probably necessary in order to prevent floor-crossing. Even in India, which is considered a beacon for democracies in the Third World, a Constitutional Amendment (42nd) enshrined a provision, as late as in 1985, for a similar reason. Such a relationship between the party and parliament in Bangladesh had serious repercussions on the working of parliament itself. The problem is still agitating the political dynamics of the country which we shall discuss later. It seems the leaders of Bangladesh are still caught on the horns of a dilemma over the issue.

The National Assembly or the Jatiyo Sangsad was to sit for a maximum of five years, extendable by a year at a time during war by an Act of Parliament, not to be extended beyond six months after the cessation of the war. It was to meet at least twice a year with an intervening period of no more than sixty days. It had to be summoned within thirty days of the parliamentary election.[17]

The Jatiyo Sangsad would elect a speaker and a deputy speaker, removable only through a resolution passed by a two-third majority of the total membership. The speaker would not vacate his seat when the House stood dissolved but would do so upon the election of a new speaker.[18]

In order to enhance the prestige, status and sovereignty of Parliament a number of provisions were included. According to J Blondel, there are four indicators which determine the high status of a legislature; (i) parliamentary immunity (the right to make statements in the House); (ii) parliamentary inviolability (the right not to be detained except in certain circumstances); (iii) procedural independence (the right to freely draft the Rules of the Chamber); (iv) freedom of meeting (the right to meet

whenever members so decide). All four rights are widely practised, though there are variations and interesting 'silences' in a number of countries.[19]

The 1972 Constitution of Bangladesh granted the House most of the 'high status' symbols. The House was given the power to frame its own rules and procedure.[20] This status is given to parliament in most countries. The legislators in Bangladesh were allowed to enjoy, following the examples of a majority of countries, parliamentary immunity for their actions, statements, voting and other rights in connection with the conduct and business of the House. They were to enjoy somewhat restricted inviolability from arrest and parliamentary proceedings could be not be challenged in court.[21] Besides, an Act of Parliament would set up a Committee of Privileges of Parliament in order to ensure these rights. Salaries, allowances and privileges would be determined by an Act of Parliament, or until then by order of the president.

With regards to the fourth criterion, i.e., freedom of meeting—the Constitution specified that the sessions of parliament and the power to summon, prorogue and dissolve the House was granted to the president. This was, however, not a serious abridgement to the maintenance of the status and sovereignty of parliament. In most representative governments such power is exercised by the chief executive. The case of the US is, however, different. As pointed out earlier, the function and role of the legislature in a representative government have profoundly changed. The modern day executive needs to make quick decisions as well as implement them without abridging the people's fundamental rights. Legislatures initially tackle technical issues of modern life and finally resign themselves to passing broadly phrased laws whose execution is in the hands of the administrative branch. The legislature surrendered many powers to the administration but retains close check through its standing, and specially appointed committees, as well as through its power to criticize.[22]

The constitution-makers of Bangladesh incorporated devices and mechanisms through which the Jatiyo Sangsad would be able to fulfil its assigned tasks. One of those devices was the incorporation of provisions to set up a committee system in parliament. As 'the increasing complexity of the modern

government not only forced the legislature to leave matters of policy formulation in the hands of the executive and be satisfied with its role to review, examine, criticize, modify, adopt, and on occasion to reject proposals,'[23] but time constraints, as well as the pressure of work, made these tasks quite formidable. As such the modern day innovation of a committee system is considered to be valuable with regards to it's 'inquisitorial functions.'

The hard task of reviewing, examining, and scrutinizing policy formulation as well as control and supervision of the executive can be more efficiently done with the help of the committee system. Various standing and select committees facilitate the passage of a greater number of bills. The system ensures that bills are given proper attention by the legislature. The committee system helps the legislature in ensuring public accountability of the executive, which has turned out to be its fundamental task. It also enables the House to use the best talents of the MPs in their respective specialized areas. As the committees are formed with MPs from both the ruling and opposition parties, they learn the art of working harmoniously, negotiating and compromise. Through the publication of their critical reports the select committees may sometimes create such pressures that the government may be forced to review or modify certain policies.

In Great Britain the evolution of the committee system has greatly helped parliament in fulfilling its designated tasks. Its powerful Public Accounts Committee, which scrutinizes public expenditure, is always chaired by a powerful opposition MP and works in close co-operation with the Comptroller and the Auditor-General. The Committee is highly respected and has the power to summon any public official for information and to answer for the economy of his respective department's expenditure. Departmental select committees have been doing the important task of giving information to the House for issues to be debated. Both the public and the MPs, thus, become better informed through this mechanism. Since 1982, departmental select committees have been allotted three days a year on the floor of the House for discussion and voting on departmental expenditures. An important point is that the government may not always change its policy due to the recommendations of

the select committees, but it does formulate its policies with the knowledge that it may be cross-examined by the committee.[24] In the United States, the Congress, through its powerful committee system, keeps a close watch on the executive. In spite of some criticism of the committee system, no one can deny its importance with regard to its role in facilitating the task of the legislature.

Keeping the importance of the committee system in mind and inspired by the golden vision of establishing an effective parliament, Articles 76(1) and (2) were incorporated. These Articles stipulated that during the first meeting of each session of the legislature, parliament would appoint standing committees of which the most prominent ones would be (1) a Public Accounts Committee (PAC); (2) a Committee of Privileges; (3) other such Standing Committees as the Rules of Procedure of Parliament require in order to examine (i) draft bills and other legislative proposals; (ii) review enforcement of laws; (iii) handle those matters referred to by parliament, (iv) investigate or inquire into the activities or administration of the ministries and to furnish information.

To ensure further accountability of the executive to parliament, Article 77 provided for an ombudsman. The office of an ombudsman is quite effective for scrutinizing and investigating the executive. The concept is rather new in many Third World countries, and many have incorporated a provision in order to create such a body. But in most countries, the office has remained on paper. Recently, Pakistan has established such an office which seems to be working in the right direction.

A complaint of malpractice against a particular ministry may be initiated by a legislator who creates a situation, either in the committee or in the House as a whole, that the government is compelled to refer the matter to the ombudsman to further investigate and report to the House. In the US, committees of the Senate and House of Representatives perform such functions. If effective, an ombudsman can make direct enquiries relating to any maladministration.

The development of the office of parliamentary commissioners in the western countries took place during the 1960s. First developed in Sweden, they have now been accepted by many western countries. The office of an ombudsman was established

in Great Britain in 1967, with the passage of the Parliamentary Commissioners Act. The ombudsman now heads an office of 90 staff members. The parliamentary commissioners further investigate reports of maladministration by an individual MP and submit a report to committees of parliament which is then considered by select committees.[25] The ombudsman, thus, is quite effective in checking any abuse of power by the executive. As such the inclusion of a provision to create an ombudsman is a step in the right direction.

Another familiar device to scrutinize the executive is the office of the Comptroller and Auditor-General. In Great Britain the Comptroller and Auditor-General has direct responsibility to Parliament and he works closely with the Public Accounts Committee. He enjoys complete independence and is not under the direction of either the PAC or the House of Commons. Every government department and the other public sector bodies have their accounts certified by the C & AG, and the reports of these accounts are regularly presented to parliament. He alone decides the subject and manner of his investigation. His status, which allows close co-operation with the PAC makes him more like an Ombudsman. His independence and co-operation are vital in checking the abuses of the executive.[26]

In order to effectively scrutinize the public accounts of the Republic, Article 127 of the 1972 Bangladesh Constitution stipulated that the office of a Comptroller and Auditor-General would audit all expenditures of the government and relay the reports of public accounts to the President to be laid before Parliament. The terms and conditions of his office were set to ensure the independence and impartiality of such an office. For the efficient working of the House a parliamentary secretariat was provided by Article 79.

Legislative procedures

Though the legislative authority is vested in parliament,[27] the parliament does not initiate any bills. Due to the complexity of modern-day government, the initiation of bills is the domain of the executive. The enactment of laws includes ordinary statutes and resolutions as well as legislation effecting the

amendment of the constitution. In a parliamentary system, most bills are initiated by the ministers and are known as government bills. The bill is, however, actually initiated by the department concerned which, in collusion with the Ministry of Law and its draftsmen, prepares the proposals. Once accepted by the cabinet the proposals are put into specific bills and introduced by the minister concerned. At the first stage there is no discussion unless the bill is *ultra vires* of the constitution. At the second stage it is either sent to the appropriate select committee or is circulated to elicit public opinion. After relevant amendments, if necessary, it is sent to parliament. It is then debated clause by clause. If passed by parliament, it is sent to the president for assent. The president may send it back to parliament within fifteen days with a message for reconsideration of certain provisions. If parliament passes it again, with or without amendments, and sends it back to the president, he would then give his assent within seven days. Failing this it would be deemed assented and the bill would become an Act of Parliament.[28] The president, however, does not have the authority to send the Money Bill back which would be presented to him with the Speaker's certification for reconsideration.[29] However, no bill which involves expenditure from public moneys can be introduced in parliament except on the recommendation of the president.[30]

The president has law-making authority under special circumstances but he cannot exercise this power when parliament is in session nor can he alter or repeal any provision of the constitutional continuation in force of any provisions of an Ordinance previously made. Under special circumstances he is empowered to authorize expenditure from the Consolidated Fund whether it is charged by the constitution upon that fund or not. But Presidential Ordinances must be laid before parliament within thirty days of its meeting and approved by it.[31]

Non-government members may introduce bills known as Private Members' Bills which may be either a public bill of a general nature or a private bill dealing with individuals of his/her constituency. The entire legislative process is conducted by presiding officials, i.e., the speaker or the deputy speaker, and is subjected to both the committee system and to the strict rules of procedure.

Financial procedure

Public accountability of the executive is the most vital component of a representative government. Between elections such accountability is ensured through the working of the people's representative body—the legislature. As pointed out earlier, though the effective governing process has passed from the legislature to the executive, the legislature still zealously retains its rights to make the executive accountable through its power to approve the financial policy of the government. Since the importance of public finance in the national economy can hardly be overemphasized, control of the public purse is of extreme importance. It is the surest way by which the legislature can influence the executive's policy formulation and also exercise an effective check on the government's taxation and expenditure, thereby making it accountable to the people. It is a crucial mechanism through which the legislature keeps a vigilant check on the executive.

The financial procedure in the 1972 Constitution of Bangladesh was modelled after that of the House of Commons or more closely still, after that of the Indian Parliament. According to these procedures, the initiative or the proposal for raising revenue and for its expenditure originate with the executive, but the executive is forbidden to either raise money through taxation or to spend the revenue unless approved by parliament. It is parliament which has the sole authority to approve the Demands for Grants and Appropriation expenditures. The traditional parliamentary control over public finance was maintained through Article 83 which stipulated that no tax could be levied without an Act of Parliament.

In order to strengthen parliament's sovereignty and curtail the dominance of the executive, Article 84(1) and (2) made provisions for a Consolidated Fund in which all money was to be credited to Public Accounts of the Republic. Any matter relating to payment into the Consolidated Fund or withdrawal of money from the Fund could not be done without an Act of Parliament or without rules made by the president on that behalf.[32]

The Budget or the financial statement of the estimated revenue and expenditure for the year is prepared by the

executive at the end of the financial year, i.e., in April-May for the new year beginning in June. It is presented in parliament by the finance minister who outlines the nation's financial position and its future developmental projects along with its estimated revenue and expenditure under various heads.[33]

The Budget or the financial statement distinguishes between the money charged on the Consolidated Fund and other expenditure.[34] The expenditures 'charged on the Consolidated Fund' include salaries of the president, the speaker and the deputy speaker, comptroller & auditor-general, election commissioner, members of the Public Service Commissions, Judges of the High Court and Supreme Court and the other expenditures charged upon the Consolidated Fund by the constitution or by an Act of Parliament.[35] In this regard the 1972 Constitution of Bangladesh kept in line with the 1956 Constitution of Pakistan which did not include the salaries of ministers and the salaries and pensions of civil servants. Their salaries, etc., should have been charged upon the Consolidated Fund in order to ensure the independence and impartiality of their services. These expenditures can be discussed by the House but cannot be voted upon.[36] These provisions are consistent with traditional parliamentary procedure in order to ensure the independence and objectivity of the Head of State and other public officials. According to the rules of procedure discussion on the Budget is carried out in the following manner: (1) general discussion on the Budget as a whole; (2) discussion on Demands for Grants and Appropriations with respect to charged expenditure; (3) voting on Demands for Grants with respect to charged expenditure.

Other estimated expenditures would be shown separately and submitted to Parliament in the form of Demands for Grants which the House could approve, refuse or reduce.[37] No Demands for Grants can be submitted without the recommendation of the president. An Appropriation Bill would be introduced in order to appropriate money needed for both kinds of expenditure. The constitution also empowers Parliament to provide Supplementary Grants, Additional Grants and Excess Grants, notwithstanding the Appropriation of expenditure as per stipulated provisions. These would be authorized by the president and laid before parliament.[38] Lastly, keeping in line

with the procedure in Great Britain, provisions were incorporated so that the House could pass demands on Account prior to the approval of Appropriation Act and Votes on Credit in case of unexpected expenditure, and to make Exceptional Grants.

A few days after the presentation of the Budget, the House permits a general discussion on the Budget. The newspapers, media and other policy-formulation think-tanks inform the public and the government about the budget in detail through publications, seminars, etc., before the general discussion takes place. During the discussion the House gets a chance to discuss the expenditure charged upon the Consolidated Fund. The House as a whole tries to feel how well or how badly the Budget has been received by the people. No motion is allowed at this stage.

It is quite obvious that the financial procedure incorporated in the 1972 Constitution of Bangladesh followed the essentials of parliamentary control over the public purse. The executive was made totally dependent (which is the central principle of an accountable government) on Parliament with regards to public revenue and expenditure. The rules of procedure provided other devices and mechanism through which the House could closely scrutinize the government's spending of public money. Usually such devices become operative after general discussion. Along with the details of the Demands for Grants for the ensuing year, budget estimates of the previous year, with its revisions, are presented in Parliament. The Demands for Grants are made in the form of a motion. At this juncture the House exercises its authority through three kinds of amendments called 'cut motions.' Refusal to supplies by a reduction of the Demand by Takka 1 is very rarely used. The second type is known as 'economy cut,' that is the Demand be reduced by a specific amount of money. The third kind, called token cut, is the procedure by which Demand may be reduced by Takka 100. The cut motions are usually moved by the opposition members but government MPs also use this procedure in order to ventilate constituency grievances, much as information and reforms of a particular Ministry may be gathered by the House. When the Finance Bill or Appropriation Bill is passed it becomes the Finance Bill of the ensuing year.

The House also scrutinizes the Government's spending through post-auditing of Public Accounts. Parliamentary control over the public purse is zealously retained and exercised by parliament in any developed representative government. It was heartening that the 1972 Constitution of Bangladesh followed similar patterns. But whether they were actually operational or remained only on paper is another matter. We shall discuss this aspect of the House when we examine its actual functioning.

Other parliamentary mechanisms or devices

The eminent English writer, Bagehot, listed legislative action of the legislature as the last one of its functions. According to him, the real function of the House is to (i) express the mind of the people; (ii) teach the nation what it does not know; and (iii) make people hear what otherwise they should not.[39] Through these activities the legislature keeps the electorate well-informed and thereby the executive remains sensitive to public opinion. After all, the ultimate check on the modern-day executive is the sensitivity of the electorate.

The rules of procedure adopted on 24 July 1974, thus provided further parliamentary devices in order to keep the executive under control. The procedures of a parliament leave a profound impact on the political life of any polity. The political behaviour, attitude, thoughts, and actions of the parliamentarians are reflected in the rules of procedure; on the other hand, traditions and conventions help the gradual evolution of parliamentary procedure. The parliamentary procedure in Great Britain is an example of the later case.

Unfortunately, Bangladesh had a very short parliamentary experience (1956-8) as a part of erstwhile Pakistan. There were no great traditions or conventions to follow. But the post-liberation leadership seemed to be eager to establish a genuine parliamentary democracy. Therefore a number of familiar parliamentary devices were provided in the rules of procedure.

The usual parliamentary day was to begin with a Question Hour. The great English constitutional expert Sir Ivor Jennings considered that parliamentary questions and their 'attendant

adjournment motions are of real and utmost constitutional importance.'[40] According to Erskine May, the Parliamentary Question Hour is an useful tool for 'extracting information' and 'pressing for action.'[41] While the technique may not be of that 'extreme importance' or unique in 'extracting information' or 'pressing for action' as considered by Jennings and May, but as most questions are meant to be on debating points it is extremely useful for the opposition to catch the government off-guard and expose its wrongdoings. Ministers are extra careful that their individual ministerial responsibility is not challenged by the opposition whereby the government could be embarrassed. Though rare, there have been occasions when the government has had to resign due to the embarrassment caused by an individual minister who was grilled and exposed by questions in parliament. The fall of the Macmillan Government of Great Britain, in the 1960s, due to Defence Minister Profumo's scandal is a case in point. Moreover, the Question Hour provides a good opportunity for back-benchers to demonstrate their talents with regards to discussing general policy and administration of the government. There are strict procedural rules for the Question Hour. Written questions requiring fifteen days notice and short-notice questions (shorter than 15 days) have been provided by the rules of procedure of the Bangladesh Parliament.[42] The Question Hour assumes political significance if it is used properly and becomes an effective tool for the opposition to keep the government on its toes by ventilating grievances as well as protecting individual rights and liberties.

The Question Hour is followed by supplementary questions which are usually answered by the ministers. As 'the function of cross-examination is thrown-open,' the back-benchers enthusiastically join in as 'it is a public fight and anybody can join in. Each member of the opposition delights in making a minister uncomfortable.'[43]

Following the example of Great Britain, the Bangladesh Parliament does not allow interpellation commonly used in continental Europe which is like a precursor to a motion of censure, but allows another important device to assume its supervisory function, i.e., the adjournment motion. This device is used by the opposition to discuss a specific issue of urgent public matter and is brought after the Question Hour and

before the beginning of the business of the day. It is only admitted in the House, if the speaker is satisfied that the matter is of real national importance and cannot be resolved through a half-an-hour discussion or by a short-notice question. As such strict rules are followed in order to bring a Motion of Adjournment in the House,[44] the government runs the risk of its downfall if the adjournment motion is passed by the House.

As there is some tension associated with the Motion of Adjournment, the Jatiyo Sangsad, following the Indian precedent,[45] allows discussion on matters of public importance for a short duration. The procedure does not allow any motion before the House. Like the half-an-hour discussion, it is initiated by a member with the minister concerned giving the answer. The co-signers who request such a motion take part in the discussion.[46]

To discuss a matter of public importance arising out of a question, the House allows a half-an-hour discussion. There can be two sittings of such discussion with a three-day notice.[47] Matters of urgent public importance can be raised with permission of the speaker immediately after the Question Hour and before the Orders of the Day are entered upon. The concerned minister answers that query at a later hour or date. There is no provision for debate and there is one question in one sitting.[48]

Another way to redress grievances is through petitions by the subjects. Individuals and small groups may file petitions and make their needs known to the House through an MP. They can be submitted to the House with the permission of the Speaker. No petitions regarding the expenditure of the Consolidated Fund can be admitted without the recommendation of the president. The petitions are referred to the Petition Committee.[49]

And finally, in a parliamentary system, the House can, if dissatisfied, remove the executive with the passage of a no-confidence vote against it.

From the above discussion, it is amply clear that the Bangladesh Jatiyo Sangsad, provided the essential principles of parliamentary practices through which it would, and if followed, could, put an effective check on the executive.

Functioning of the Jatiyo Sangsad under Mujib (1973-5)

The life of a sovereign parliament in Bangladesh was supposed to have begun with the convening of the Constituent Assembly, consisting of the members of the National Assembly and Provincial Assembly elected in the elections held in December 1970 and January 1971 respectively, of what was then East Pakistan. The Constituent Assembly which was entrusted with the task of framing a constitution, was also to act as the legislature of the country. The latter function of the Constituent Assembly, however, remained inoperative while Prime Minister Sheikh Mujibur Rahman ruled the country through Presidential Ordinances. The Constitution was adopted on 16 December 1972, and Sheikh Mujib, true to his pledge, held a general election on 7 March 1973, and got a fresh mandate to rule the country for the next five years.

At the outset, the country seemed to be on the right track as far as the institutionalization of a democratic order and the strengthening of parliament as an institution was concerned. But two factors raised suspicions and apprehensions about the smooth functioning of the Jatiyo Sangsad: (1) Article 70, as pointed out earlier, circumscribed the independence and free-spirit of the MPs. It seemed quite appropriate in the context of the then existing circumstances to incorporate such an article in the Constitution; but nonetheless it was a deviation from traditional parliamentary practice; (2) the results of the March 1973 election created some problems. Out of 300 seats, the Awami League won 293 seats; the remaining 7 seats were distributed in the following manner: Jatiyo Samatantrik Dal 2, Jatiyo League 1, National Awami Party (Bhasani) 1, and the rest were independents. Later through Presidential Order 50, 15 reserved seats for women were created for ten years, the Order being deemed to have been effective from 16 December 1972.[50] These seats were bagged by the Awami League thanks to the mode of election of the women MPs. Thus, the Awami League ended up having 297 out of the 315 seats and only six MPs remained in the Opposition. As a result, the Jatiyo Sangsad of 1973, had in effect no established constitutional opposition which required a membership of at least twenty.

This was a serious drawback as the role of the Opposition is supposed to be extremely crucial in a parliamentary system. Without a responsible opposition in parliament, its functions are seriously hampered. According to Professor Morris-Jones, 'In the absence of a proper Opposition, with adequate strength and enjoying recognition, there can be, it is said, no healthy parliamentary government, for the government will be uncontrolled and unresponsive.'[51] The main task of scrutinizing, supervising, criticizing and examining the executive falls on a responsible opposition. Unfortunately, in the 1973 Jatiyo Sangsad, there was no such phenomenon. But the example of a Congress-dominated one-party parliamentary system is often cited which has in no way hampered the functioning of the Indian parliamentary system. The Indian success story is mainly a creation of the leadership quality of Jawaharlal Nehru, the democratic structure of the internal organization of the Congress Party and criticism/suggestions put forward by the parliamentary committees. The Nehru government, in spite of having an absolute majority, treated and behaved with the Opposition with the respect a parliamentary opposition deserves.[52]

No such attitude on the part of the ruling party was discernible in the first Parliament of Bangladesh. During 1973-5, those six lone members of the 'Opposition' tried to take upon themselves the responsibilities of an opposition. Ataur Rahman Khan was their unofficial leader. But this Opposition was feeble, frustrated and unable to offer an alternate government. The ruling party showed intolerance even to this feeble opposition. The fact of the matter is, that it was not a constitutionally-recognized Opposition and as such they were not treated accordingly by the government. Moreover, Mujib's domineering personality and curtailment of freedom of the MPs allowed the government a free hand in dealing with the Opposition. It was evidenced by the parliamentary activities of the First Sangsad.

As pointed out earlier, the Question Hour is an important part of parliamentary activities through which grievances are ventilated and individual rights are protected. In the case of the first Parliament, the Question Hour activity began from the second session. In all, the House accepted 5288 starred and

22 unstarred written questions. The number of short-notice questions was 30 starred and 11 unstarred. Only one-third of the total questions were answered. Most of the questions dealt with constituency interests whereas only a few related to national policy. Out of all the sessions of the first Parliament, the Question Hour was most interesting during the second session when Ataur Rahman Khan raised issues relating to the printing of Bangladeshi currency in India, with the finance minister. This was followed by supplementary questions which generated some interest in the House. A few questions were asked about a mysterious fire in the jute godowns in various parts of Bangladesh. The issues raised by the MPs and answers given by the ministers were not tackled the way they should have been, in order to scrutinize the defects of the administration. During the Question Hour, debates are not supposed to run along party lines but most Treasury-Bench MPs were apprehensive and extra-careful not to step out of line.

Basically the Question Hour generated neither much interest nor any debates on public policies. Interestingly, as the over-all socio-economic problems as well as law and order deteriorated, the number of questions declined. During the eighth session, there was no Question Hour at all.

Similarly, the short-notice questions and supplementary questions also could not generate interest and public debate as happens in most developed democracies where the 'back-benchers' as pointed out before, 'take a delight in heckling a Minister.'[53] The back-benchers of Bangladesh's First Jatiyo Sangsad refrained from such activities due to the reasons mentioned above.

The familiar parliamentary procedure of the adjournment motion, used to call attention to problems of government, was not allowed although there were daily reports in the newspapers about the deteriorating law and order situation, especially about the clashes occurring between *Rakhi Bahini* and the radical forces. By late 1973 and early 1974, the situation had deteriorated to such an extent that the government had to deploy the army to handle it. In all there were seven adjournment motions but none were accepted. Motions relating to the army's power and alleged use of excessive and repressive measures were not tabled

in the House. It should, however, be pointed out that in modern parliaments, adjournment motions are rarely allowed, but this does not mean that its significance in calling attention of the government to its misdeeds can be completely dismissed, for it does allow the House to be aware of the situation and arouses public reactions to its consequences. Unfortunately, the first Jatiyo Sangsad decided to turn a blind eye and tried to brush aside the issue of the government's arbitrary actions and infringement on civil liberties in the name of maintaining law and order. Four notices for half-an-hour were similarly ignored. Even the procedure, an innovation of the Indian Parliament used in place of the adjournment motion which is associated with some tension, were not properly used. There were only five such notices of which two were accepted for discussion. Interestingly, one such discussion was on the glorious role played by Sheikh Mujibur Rahman in the Non-Aligned Conference held in Algiers! The House also accepted 52 notices for calling attention to matters of urgent public importance and discussed only 16. It is quite obvious that the House because of the 'brute majority' of the ruling party and its high-handed attitude—could neither criticise nor scrutinize nor check the government arbitrary actions, nor stop the government from infringing on individual liberties and civil rights. To quote K C Wheare, 'the House was unable to make the Government behave.'[54]

On the contrary, by September 1973, the Prime Minister further curtailed the powers of Parliament through the Constitution (Second Amendment) Bill 1973, which increased the number of days in between the sessions from 60 to 120 days and armed the executive with emergency powers and preventive detention. The Bill was neither sent for eliciting public opinion nor to the Select Committee, as suggested by the Opposition. It was passed by a division vote of 250-0, and took only two hours in the midst of a walk-out by Ataur Rahman and *Janab* Abdus Sattar.[55] To begin with, such a controversial bill was introduced in the House without much commotion. According to the rules of procedure, however, no bill is opposed at the first-reading stage. But in the Indian Parliament, such a convention was broken for the first time on 23 November 1954, when voting by division was forced at the time the Preventive

Detention (Amendment) Bill, 1954 was introduced in the House. It was, however, carried by 146-36.[56] Such was the difference of parliamentary procedures between the Indian Parliament and the Bangladesh first Jatiyo Sangsad (parliament).

As we turn towards the legislative function of the first Jatiyo Sangsad, the picture is equally disappointing. The House usually spends the bulk of its time scrutinizing, examining and modifying various bills mainly initiated by the government which affect national interest. There are times, though the government may not admit it, when it is forced to modify its policies due to the Opposition's relentless scrutiny through the committee system as well as parliamentary debates. As pointed out earlier, even in an one-party parliamentary democracy like India, recommendations and amendments suggested by parliamentary committees cannot be ignored by the government if it wants to remain sensitive to public opinion. The opposition members also force the government to accept various amendments through vigorous parliamentary debates.

Unfortunately, both the crucial factors through which parliament uses its control over the executive were highly underdeveloped. In the first Parliament, 110 Acts were passed out of which 91 were Presidential Ordinances. As pointed out before, according to Article 93(1) of the Constitution, the president has law-making powers during extraordinary circumstances or when the House is not in session. But even at a glance, one is able to comprehend how the Parliament was by-passed by the executive. And even Constitutional provisions like the Representative of the People (Seats for Women) and Presidential Ordinances mounting abridgement of constitutional provisions of fundamental rights, were incorporated in the Constitution through presidential orders, only to be laid before a tamed Parliament in order to have its seal of approval.

Accordingly, various controversial ordinances were put before Parliament in the form of bills. The Printing Presses and Publications (Declaration and Registration) Bill, 1973; the *Jatiyo Rakhi Bahini* (Amendment) Bill, 1974; the Special Powers Act, 1974; the Special Powers (Amendment) Act, 1974; the Special Powers (Second Amendment) Act, 1974; the Emergency Powers Bill, 1975; and the controversial Constitution (Fourth

Amendment) Bill, 1975, were all passed without either eliciting public opinion or being sent to the Select Committees. The Parliament's ineffective powers in scrutinizing these bills were evidenced by the short lengths of time spent on them, which were as follows: the Printing Presses & Publication (Declaration & Registration) (Amendment) Bill, 1974 took one hour and 45 minutes with participation by four Opposition and one government MP, and a walk-out by the Opposition; the *Jatiyo Rakhi Bahini* (Amendment) Bill, 1974 took two and a half hours, with participation by four Opposition and two government MPs, with a walk-out by the Opposition; the Special Powers Act, 1974 took four hours, with participation by six Opposition and one government MP, with a walk-out by the Opposition; the Special Powers (Amendment) Bill took three hours and ten minutes, with participation by four Opposition and two government MPs, with a walk-out by the Opposition; the Special Powers (Second Amendment) Bill, 1974 took twenty-five minutes, with participation by two Opposition and one government MP, with a walk-out by the Opposition, and the controversial Emergency Powers Bill, 1975 as well as the Constitution (Fourth Amendment) Bill, 1975 together took only half-an-hour. Bills of such a nature which struck at the very core of a democratic order had unbelievably smooth sailing. In comparison, the Indian Parliament took fifty-seven and a half hours to pass the Preventive Detention Bill, 1952; fifty-two hours to pass the Press (Incitement to Crime) Bill, 1951; and thirty-nine hours to pass the Representation of the People (No. 2) Bill, 1950 respectively. Similarly, compared to the amendments accepted by the government of Bangladesh, the Indian government accepted more amendments, demonstrating that even in a parliament dominated by one-party, individual members brought amendments in order to make their mark.[57]

The lack of proper scrutiny of bills by Parliament during the Mujib era was also due to the weak committee system. The Opposition was not strong enough to insist on having a powerful committee system. There were only seven Standing Committees, including a Public Accounts Committee, and only a few Select Committees on non-important bills. A Petition Committee was set up during the sixth session of the House but no petition was submitted. Only one report on the rules

of procedure was submitted and accepted during the fifth session of the House. The government took up all the time in parliamentary business. Unlike in India, no specific period was set aside for private members' business as such. During the first parliament there were neither any private members' bills nor any private members' resolutions before the House. This, clearly demonstrated the dominating position of the executive over parliament.

The decline of parliament was nakedly evidenced during the passage of the Emergency Powers Bill, 1975. A resolution which read,'... that this Parliament approves the Proclamation of Emergency issued under clause (1) of Article 141A of the Constitution of the Peoples' Republic of Bangladesh by the President on 28th December, 1974' was moved by Shah Moazzam. It further stated, 'that there should be no discussion on the resolution of the approval of the Proclamation of Emergency and that the rules be suspended.'[58]

Ataur Rahman pointed out that the motion had not followed the proper rules of procedure. He was told by the Speaker that rules 130-144 would not be applicable in this case and a special procedure would be followed which was then applied. The bill was introduced by Law Minister Monoranjan Dhar, who declared that rules 78, 79, 82 and 91 of parliamentary procedure would be suspended in the application of the motion.[59]

Abdullah Sarkar raised objections and asked permission of the House for discussion; otherwise it was bound to be passed in an undemocratic manner. The Chief Whip informed the House that no discussion would be allowed. The bill was, however, passed without either any formal voting or participation by the MPs.[60] *Janab* Mohammad Abdullah Sarkar gave notice of an adjournment motion, which, as expected, was not accepted by the Speaker.[61]

Another significant and crucial bill, namely the Constitution (Fourth Amendment) Bill, 1975, which completely changed the fundamental structure of the Constitution, was passed in a similar hurried manner. Usually, a bill is introduced in the House with seven or three days' notice. In the case of the above-mentioned bill, it was circulated among the members after their arrival in the House. Excepting a few associates of

Mujib's, the majority of the MPs were not even aware of the contents of the bill. The Prime Minister, upon his arrival in the House, exchanged pleasantries with some of the top ranking MPs of the Awami League Parliamentary Party. Not a word was mentioned about the bill or its contents.[62]

Janab Abdullah Sarkar again raised objections to the manner in which the bill was being introduced, as it deprived the House of any opportunity to bring amendments, and demanded a discussion. Once again rules 78, 79, 82 and 91 of parliamentary procedure were suspended in their application to the motion, as moved by Law Minister Monoranjan Dhar in the case of the Constitution (Fourth Amendment) Bill, 1975. Voting was over in three minutes by a division vote of 294-0 in the midst of an Opposition walk-out. The entire procedure took less than half-an-hour with participation by one Opposition MP. Thus the seal of approval was given by Parliament which turned it into a sham show. Such was the power of Parliament in checking the arbitrary action of the executive!

Similarly, the first Jatiyo Sangsad also failed miserably in exercising financial control over the executive. As pointed out earlier, one of the effective weapons available to the legislature to control and make the executive behave properly, is its power over financial matters. Judged by this criterion the first Parliament during the Mujib era could not discharge this vital role effectively for the reasons mentioned above. The passing of the budget and its subsequent scrutiny remained in the executive's domain.

Subsequently, the legislature exercises its control through post-auditing of the government's financial accounts. An office of a Comptroller and Auditor-General (C&A-G) was established by the prime minister through the Comptroller and Auditor-General Order, 1972 (Presidential Order No. 15 of 1975). But unlike the C&A-G of Great Britain who is directly responsible to the House of Commons and works independently in close co-operation with the Public Accounts Committee, the C&A-G of Bangladesh was made responsible to the president. Article 6(1) stipulated that the C&A-G would perform such functions and exercise such powers, and prepare such reports, in relation to the expenditure and accounts of the Government of Bangladesh as may be determined by the president. The

reports would be kept in such form by the C&A-G with the approval of the president; finally, he would submit the reports relating to the accounts of the Peoples' Republic of Bangladesh to the president who would lay it before parliament.[63]

The Public Accounts Committee was formed during the first session of the first Parliament on 7 April 1973, with Jahirul Qayyum as the Chairman. Now not only was the C&A-G made responsible to the president and not to the House, the chairmanship of such an important committee also went to a Treasury Bench member. Both in Great Britain and India, the ministers are excluded from the chairmanship of either the Public Accounts Committee (PAC) or the Estimates Committee. By convention, the PAC, in these countries, is chaired by a top ranking Opposition MP. In England between 1959 to 1963, the PAC was chaired by Harold Wilson.

Obviously, in such a set-up in Bangladesh one could easily comprehend the effectiveness of Parliament's financial control over the executive. Throughout the first Jatiyo Sangsad the PAC met only thrice, on 26 January 1974, 2 February 1974 and 7 February 1974. The PAC consulted the C&A-G and discussed its *modus operandi*, etc. No audit reports were submitted and discussed in the House.

From the above discussion of the functioning of the first Jatiyo Sangsad, it becomes crystal clear that the Sangsad could not fulfil the glorious vision of its role, i.e., check and control the arbitrary actions of the executive as envisaged in the 1972 Constitution of Bangladesh. Sheikh Mujib with his long-standing commitments to a parliamentary system had no doubt dreamed of institutionalizing parliament. During the first session of the Constituent Assembly, he had reminded the Speaker, Shah Abdul Hamid, of his role as a speaker in a parliamentary democracy, and how fundamental a neutral stance and objectivity in the evolution of parliamentary convention was.[64] But events turned out quite the opposite. In the absence of an established constitutional Opposition, parliamentary leadership was heavily tilted in favour of the ruling party. The difference in the legislative strength of the government and the Opposition was so huge that it could neither focus on the government's blunders and arbitrary actions nor project itself to the electorate as an alternate government. Moreover, the frustrated and feeble

Opposition knew that a trial of strength through a vote of no-confidence was quite impossible due to restrictive constitutional provisions. The government's attitude towards the Opposition was also one of intolerance and indifference. The fact that there was no Private Members' Bill or Private Members' Resolution, demonstrated that the wishes of the Opposition were not taken into account.

Unfortunately, Sheikh Mujib could not institutionalize his personal popularity, unlike Jawaharlal Nehru of India, who in a similar situation, managed to do so. Moreover, mutual-blind loyalty between him and his party members, which was a big boon during the Pakistan era in building up party solidarity, became an impediment once he became the head of government. He could not rise above the party. His government, in effect, became a party government and parliament being dominated by the party became a 'rubber stamp' one.

As pointed out earlier, in such a situation the internal organization of the party and a strong parliamentary committee system go a long way in making the executive aware of public opinion. None of these factors existed during the Mujib era. Moreover, the prime minister was cut-off from party channels due to the curtailment of the freedom of individual MPs. The failure of the PAC to function properly, C&A-G's constitutional role and status, non-implementation of Article 77 (i.e., establishment of an office of the Ombudsman), committees to probe and investigate into departmental maladministration as well as the legislative proposals, all contributed to the decline of parliament during the Mujib era.

With regards to structure and procedural rule, the first Jatiyo Sangsad was a sovereign one. But the criteria for factors, such as legislative functions, the role of the legislators, formulation of policy, control of finance, criticism and supervision of the executive, providing channels for ventilation of grievances, and lastly, parliament's powers to remove the executive through a vote of no-confidence, were all lacking. The fact that there were no Private Members' Bills and Private Members' Resolutions and there were no serious amendments to government bills and the way legislative measures were rushed through parliament proved that the legislature's powers lacked substance, and in effect the cabinet was the *de facto* legislature.

Naturally, the cabinet became extremely powerful without any restraints on it. The rising expectations and aspirations of the people during the post-liberation period were not reflected in parliament. Instead of trying to accommodate the various conflicting interests of the people within parliamentary politics, Mujib, the populist, decided to rule the country through a constitutional dictatorship. The absence of an opposition made this an easy endeavour. The passage of the Constitution (Fourth Amendment) Bill, 1975, was a monumental example of the impotence of the first Parliament of Bangladesh.

The status of parliament under the Fourth Amendment

As pointed out earlier, the Constitutional Amendment Bill of 1975 made structural and procedural changes in the political order of the country. The parliamentary system was converted into a one-party presidential system. It was modelled after the former Soviet Union in which Parliament was made an appendage of the executive. The appointment and functions of the prime minister and the Council of Ministers and powers of dissolution were made subject to the president's discretion. The cabinet was responsible to the president and he could include any number of non-MPs into his cabinet. This was justified by the fact that in a country like Bangladesh where there is a dearth of skilled people, the president could use the know-how of the technocrats. A new Article 73A, however, eliminated the voting rights of the non-MP ministers. Besides vesting all powers—legislative, financial etc.,—in the executive, a number of provisions were also incorporated to make parliament completely subservient to the executive. A new proviso in Article 72, in clause (1) stipulated that parliament only needed to meet twice a year. No minimum time period was mentioned, which signified the non-utility of parliament as an institution. Article 70, which had already curbed the independence and freedom of the individual MPs, was made more stringent with an explanation stating that an MP would not only lose his seat for resigning or voting against the party which nominated him for election, but, he would also lose his

seat for (a) being present in Parliament but abstaining from voting, or (b) absenting himself from any sitting in Parliament or ignoring the direction of the party which nominated him for election.[65] As mentioned earlier in our chapter on the executive, an addition of the words 'or declare that he withholds assent therefrom' after the words 'assent to the Bill,' in Article 80(3) completely stripped Parliament of its role in the legislative process.[66] Finally, Parliament's power to remove the executive through its power of impeachment, as it exists in a genuine presidential system like in the US, was in effect taken away.[67]

The legislature under the Fourth Amendment became merely an ornamental institution with no powers to check or control the executive. It was mainly a facade of democratic ideals without any effective powers. It was a total negation of the spirit of constitutional democracy.

The structure of parliament under Ziaur Rahman

As we have pointed out in our discussion on the executive in Bangladesh, after the overthrow of the Mujib regime in August 1975, there was a period of political instability and a vacuum. Between 15 August 1975 and 6 November 1975, the status of parliament remained ambiguous. When the late President Ziaur Rahman, like many other military rulers, started the process of civilianization, he began to reshape the political system in the country. The main changes brought about by Ziaur Rahman under the Fifth Amendment of the Constitution were related to the executive. He introduced a novel variety of executive powers which we have already discussed. With regard to the legislature, we find some consequential changes as a result of the transformation of government from a parliamentary form to a presidential one. It was almost certain that changes in the role of the legislature and the relationship between the legislature and executive would also take place. Let us now examine the changes with regard to the legislature as brought about by President Zia.

As regards the composition of the legislature, the number of reserved seats for women was increased from 15 to 30, the

period this clause was to remain in force was extended from 10 to 15 years and it was deemed to have been effective from the day the Constitution came into force, i.e., 16 December 1972.[68] The reservation of seats for women was also a feature of the 1972 original Constitution. As regards the relationship between the legislature and the executive, the 1972 Constitution provided that, 'The Cabinet shall be collectively responsible to the Parliament.' 'Collective responsibility' of the cabinet is a cardinal feature of any form of parliamentary democracy. It has acquired some definite meaning and connotations. It implies that a cabinet shall hold office as long as it enjoys the confidence of the majority members of parliament. It also implies that the cabinet would resign if a vote of no-confidence is passed against it. And this vote of no-confidence is linked with the power of dissolution.

Under Zia's new political order there was no provision that the cabinet would be 'responsible to the parliament.' The Cabinet under Zia's political order was to hold the office 'during the pleasure of the President,' which is a usual and standard feature of the presidential system. But, as we have indicated, Zia's political order was neither a full-fledged presidential system as it exists in the United States, nor was it a parliamentary system. He amended the Constitution through a number of proclamations which sought to restore some of the prestige and powers of parliament—that were totally denied under the Fourth Amendment. At the same time, he kept the amended provisions of the Constitution which strengthened the executive organ of the government. Some writers have compared Zia's system with the French system under the Fifth Republic which can be described as a synthesis of a parliamentary and presidential system. Under the Fifth Republic, a prime minister needs to hold the confidence of the president at the time of his appointment, but for his tenure he needs the confidence of parliament, which is empowered to put a vote of censure and have the government defeated with the passage of censure by an absolute majority vote. The defeat of the government is not linked with the dissolution of the House. The power of dissolution is exercised by the president after holding consultations with the prime minister and the presidents of the two chambers. In the case of Bangladesh, the prime minister

and the Council of Ministers were to be appointed by the president and would hold office at the pleasure of the president. The power of dissolution lay entirely with the president. In a genuine presidential system like that of the US, the president can neither convene nor dissolve the legislature. As such, the parliament's existence in Bangladesh, under Zia, depended entirely on the pleasure of the president. He, however, provided that no more than one-fifth of the cabinet appointed would consist of non-MPs. This provision was somewhat in line with parliamentary democracy. The structure of Zia's political system and that of France under the Fifth Republic are not without some justification. But the French legislature under the Fifth Republic is much more powerful than the parliament under Zia's system. The collective responsibility of the French Cabinet to Parliament and the financial authority exercised by the latter make it more effective, as well as more powerful, than the legislature under Zia.

The most important changes that Zia brought in with regard to the role of the legislature related to parliament's power over the budget and financial matters. Under a new Article 92A, Zia provided that in respect to finance:

(a) If the legislature has failed to make the grants under Article 89 and pass the law under Article 90 before the beginning of that year and has not also made any grant in advance under Article 92; or

(b) has failed to make the grants under Article 89 and pass the law under Article 90 before the expiration of the period for which the grants in advance, if any, were made under Article 92; or

(c) has refused or reduced the demands for grants and a request for reconsideration of the demand has been made by the president in a message to it, the president may, by order, authorize the withdrawal from the Consolidated Fund of moneys necessary to meet the expenditure mentioned in the annual financial statement for that year for a period not exceeding one hundred and twenty days in that year, pending the making of the grants and passing of the law.

In a presidential system as it exists in the United States, the 'independent existence of a proud, zealous and watchful

legislature is a very important feature.'[69] The legislature is the main source of influence in restraining and controlling the executive. Again, if one makes a comparison with the financial control of the French Parliament over its executive, one finds that the Parliament is not entirely helpless. The government can force a bill on Parliament through a vote of confidence. The question of confidence is considered passed if there is no motion of censure within twenty-four hours. As such, Parliament can obstruct an unpopular budget by raising the motion of censure.[70] Obviously, unlike in Bangladesh, the French Legislature can use its financial control over the public purse and keep the executive in check. The curtailment of the powers of the legislature in matters of finance was, therefore, a serious set-back in the evolution of constitutionalism and democracy in Bangladesh.

The idea of curtailing the financial powers of the legislature has a long history behind it in our subcontinent. During the British Raj, when parliamentary democracy was introduced under the Government of India Acts of 1919 and 1935, the Governor-General and provincial governors had what was known as, 'power to certify budget,' even if it was not passed by the legislature. At the centre, the Governor-General used to 'certify' the budget almost every year during the British period until the system was liquidated in 1947. This was almost an annual phenomenon during the British period.

As pointed out earlier, after independence in 1947, this idea of introducing restraints on the powers of the legislature in financial matters first originated during the era of 'controlled democracy' of Ghulam Mohammed and Iskander Mirza in 1954-5, in Pakistan. A British constitutional expert, Sir Ivor Jennings, was brought in to find out devices to reduce the powers of the legislature in financial matters. In 1955, a draft constitution was prepared by Jennings which provided that if the legislature failed to pass an appropriation bill before the beginning of the financial year to which it would relate, the president might, by ordinance, continue in operation for that financial year the appropriation act relating to the preceding financial year, and the ordinance would have full force and effect as if it were an Act of Parliament.[71]

Sir Ivor Jenning's draft Constitution was, however, not accepted in 1955, but when martial law was introduced in

Pakistan in 1958 and Ayub Khan subsequently introduced his version of 'controlled democracy' under the 1962 Constitution, we find that legislative powers in financial matters were severely curtailed. Zia seemed to have been influenced by ideas such as those of Ayub Khan as regards the powers of the legislature. He, no doubt, wanted to have some form of representative government, but like the British Government in undivided India or Ayub Khan in Pakistan, he was anxious that the people's representatives in the legislature should not have absolute power in certain matters. He wanted to prevent what he described to some political experts and political scientists as 'paralysis of the administration' and to ensure what he used to describe as 'political stability' and continuation of economic development.[72] Zia seemed to have the views that an independent legislature under a genuine presidential system whose job is to criticize, supervise and scrutinize the executive, without being responsible like the one found in a parliamentary system, could be, according to Zia, 'obstructionist, can nullify the government, can be merely factious and self-seeking, and it can be corrupt.'[73] And in a country such as Bangladesh where economic development is of supreme importance, the country could not afford the luxury of such an 'obstructionist' Opposition. It needed quick decisions and swift implementation of governmental policies. Like Ayub Khan and many other leaders of the Third World he believed that in a country like Bangladesh with widespread illiteracy, an irresponsible Opposition needed guidance to perform their functions. Zia seemed to believe, like the French Constitution under the Fifth Republic, that certain matters 'are inherently executive in nature' and as such defined a domain of the law to which the power of parliament should be restricted. Such a conception of restraining the powers of the people through their representatives in legislature, betrays a lack of faith in the ability of the people to govern themselves. There is no doubt that Zia had faith in some form of controlled or guided democracy. But there can hardly be scope for an independent and powerful legislature under such a concept of restricted democracy.

Zia curtailed the legislature's power (under another new Article, 145A) relating to international treaties. This particular clause provided that all treaties with foreign countries should

be submitted to the president, who should cause them to be laid before parliament, but there was a significant sub-clause that 'no such treaty should be so laid if the President would consider it to be against the national interests to do so.'[74]

This provision that people through their representatives in the legislature cannot be trusted to ensure the 'national interests' of the country is a gross violation of faith in constitutionalism and democracy. There can be no better custodian of national interest than the people themselves. Nobody should consider himself a better guardian of the national interest than the people. We may add here that in a true presidential system as it exists in the United States, the president cannot make any treaty without the approval of the Senate, the Upper House of the US legislature.

With regards to legislative procedure, Zia omitted, through the Second Proclamation Order No. IV of 1978, the words 'or declare that he withholds assent therefrom' of Article 80 Clause (3) which in essence was like a presidential veto under the Fourth Amendment of the presidential system and made the procedure like that of a parliamentary one. But at the same time the initiation of legislative bills lay with the president who, like the US president's state of the union message, outlined major policy initiatives of the government. The US Congress does not hold a debate on the presidential message, but legislation is proposed by the appropriate committee somewhat within the guidelines of the speech. The Congress, however, proposes bills independently as well. In Zia's system, the presidential speech, given at the beginning of each session, was debated as is done in a parliamentary system and government bills were initiated by the president through his hand-picked cabinet. He also denied the legislature its power to remove the executive through impeachment, as he kept the provisions of the Fourth Amendment, which in effect were non-exercisable.

The political order set up by Ziaur Rahman were, thus, a curious mixture of the parliamentary and presidential systems. But, the legislature had so many restrictions and limits on its powers that its effectiveness in checking, scrutinizing and controlling the executive was undoubtedly questionable. Let us now examine the actual functioning of the legislature under President Zia.

The functioning of the second parliament

The parliamentary election of 1979 was held while the country was still under martial law. As a matter of fact, the Parliament itself was revived by a presidential proclamation. The Bangladesh Nationalist Party, which President Zia had hastily assembled to fight the election, had the following manifesto: a new identity for the people of Bangladesh, a presidential form of government with a sovereign parliament, a development-oriented economy, and a promise to withdraw martial law within a week of its first session.

The election was held on 18 February 1979. The following was the composition of the House: Bangladesh Nationalist Party—250 (including the women's seats); Awami League—39 (Ukil); Awami League—2 (Mizan); Jatiyo League—2; Jatiyo Samajtantrik Dal—8; Muslim League—12; Islamic Democratic League-6; Gano Front—2.

From the composition it looked better than the first Parliament, as the House now had a constitutionally-established Opposition. It passed 110 acts out of which 27 were ordinances in the form of bills and subsequently passed by the House. Interestingly, the second Parliament experienced a larger volume of parliamentary activities. It received 49 adjournment motions, out of which 29 were discussed and two were dealt with by the statements of the concerned ministers. Motions were moved regarding various issues, including foreign policy, law and order, high prices of essentials, etc. It accepted 5003 starred and 572 unstarred written questions as well as 21 starred short-notice questions. The concerned ministers also dealt with a large number of supplementary questions. Nine half-an-hour discussions were accepted out of which only two were discussed. Out of 264 notices calling for attention to matters of urgent public importance, 221 were discussed and 28 others were dealt with by the statements of the concerned ministries. The calling of attention to matters of urgent importance for short-duration volume was also larger than for the first Parliament.

More time was also assigned to Private Members' Bills and Private Members' Resolution. Although most of them were not discussed due to a shortage of time or adjournment of the House, a tendency to pay more attention to the Private Members'

business was discernible. Zia also further developed the committee system. The House established seven standing committees, a few select committees on non-important bills, and thirty-six departmental committees which were to be chaired by the ministers concerned, including the technocrat ministers.

During this period the Public Accounts Committee was initially chaired by Atauddin Khan, a Treasury-Bench member. It was formed on 30 April 1979, and held only one meeting, on 1 June 1979, to discuss its *modus operandi*. Since the chairman took over a ministerial portfolio another PAC was formed on 3 March 1980, with Ataur Rahman Khan as the chairman. This committee was subdivided into three subcommittees and it prepared 11 commercial reports and five other reports and submitted one preliminary report to the House which was partly discussed. An Estimate Committee was also formed for the first time, with Abdur Rahman Biswas (Treasury Bench) as the chairman.

The House also passed the Ombudsman Ordinance of 1980. The Act stipulated the establishment of the office of Ombudsman appointed by the president on the recommendation of Parliament.[75] But an office of such a body to investigate departmental maladministration has not yet been set up.

Out of all the Acts passed by the second Parliament, the Constitution (Fifth Amendment) Bill 1979, was the most controversial one. It was passed during the first session of the second Parliament, which was short and without any important parliamentary activities. The Bill, which sought to ratify and confirm all proclamations, martial-law orders and other laws made during the period between 15 August 1975 and 9 April 1976, (both days inclusive) was introduced on short notice. The Opposition raised objections to the point of order and rules of procedure, as well as on principle. The debate on the Bill was lively, and at times acrimonious, but in a familiar demonstration of the House's incapacity to influence policy decisions of the government, the Bill was passed by a division vote of 241/0 without either the House sending it for eliciting public opinion or to the Select Committee. It took five and a half hours with 22 MPs taking part in the deliberations. As usual the Opposition staged a walk-out. All through the sittings of the second Parliament there were repetitions of similar

scenarios. The Opposition was able to make a lot of noise, but its fundamental function, to check and control the executive, was non-effective.

Zia liberalized somewhat parliament's role from that which existed under the Fourth Amendment, by such provisions as the deletion of the new proviso of Article 70 under the Fourth Amendment of the Constitution and making conditions of the independence of the MPs less stringent. The election was also to be contested under a multi-party system. But in assessing the effectiveness of the legislature, one has to view the executive-legislative relationship which varies from country to country. The relationship under Zia was neither as that of a parliamentary or a presidential one. It was not even like that of the Fifth Republic of France. One finds that due to certain constitutional provisions the role and the effectiveness of the legislature under Zia were seriously undermined. The absence of collective responsibility turned the question-hour, adjournment motions, etc., into a parody. Even the motion of no-confidence lost its significance. So the familiar parliamentary devices for controlling the executive did not mean anything. No wonder such a large volume of adjournment and other motions were admitted in the House. Other limiting factors, as pointed out, were the lack of legislative and financial control, which deprived the legislature of its designated rights which are so zealously retained by most parliaments of the world. The Congress in the US, is particularly concerned with these issues and fulfils its task through the appointment of various committees.

The executive-legislative relationship under Zia was also not like the one found in a genuine presidential system. The chief instrument through which the legislature controls the presidential executive is the committee system. It sets up committees to propose legislative bills somewhat along the lines of the presidential message to the House. In Zia's Parliament the cabinet presided over by the president initiated the bills. The situation was somewhat like France, but at least in France the cabinet takes the responsibility (this may not be fair, as they have to take the responsibility for an unpopular bill, initiated by the president). But in the second legislature the cabinet was not responsible and in case of 'misbehaviour' on the part of the House the president's power of dissolution

could always make it 'behave.' Similar situations could arise as far as the financial power of the president was concerned. Discussion on budget, as such, became a routine matter in which neither the policies of the government nor constituent interests generated serious discussion inside or outside Parliament.

The departmental committees set up by the second Parliament resembled neither in structure nor in actions the ones found in a genuine presidential system. In a genuine presidential system, as in U S the departmental committees may be chaired by members of the legislature belonging to the presidents' party but these committees are zealous about investigating actions of the executive. Not only are the bills referred to the appropriate committees, but most committees 'question the executive and investigate departments.' In the US, the House of Representatives and Senate Committees not only question the relevant secretaries and senior civil servants, but they also call outside witnesses. Obviously, the committees do a more thorough and detailed investigation of the executive than an individual MP can do.[76] But the Departmental Committees in the second Parliament were all chaired by ministers, including technocrat ministers. The natural corollary was that the committees were ineffective. Their work was more a charade than anything like substantial investigation. Moreover, none of these committees submitted their reports to the House.

Zia thus established a legislature whose activities and trappings gave it the aura of an effective parliament. But actually, parliamentary activities and departmental committees and debates were designed to 'train' parliamentarians while the chief executive maintained a tight control over parliament. Zia himself stated in his inaugural speech that it takes long to learn parliamentary conventions and traditions. Each MP needs to have knowledge about the structure and administration of the government before he can really fulfil his designated role. He hoped that through the experience gathered in the second Parliament, the Honourable MPs would be able to establish conventions and traditions which would help promote democracy. He also lectured the MPs about their expected role as MPs of a 'sovereign parliament.'[77] Zia's Parliament was, however, not a 'sovereign parliament' but a 'lame and tame'

one, tailored to fulfil the needs of an all powerful executive. It had very little control over the executive's actions.

The legislature under the Ershad regime

When General H M Ershad dismissed the civilian government headed by Justice Abdus Sattar in 1982 in a peaceful military coup, Bangladesh again entered into a period of martial law, with the Constitution suspended. Ershad was no exception to military rulers of other Third World countries, in making promises that democracy would be restored 'as soon as possible.' Like Ziaur Rahman, he also started the process of 'civilianization.' He held the Union *Parishad* election, a referendum in 1985, organized his own political party, namely the Jatiyo Party, and held both presidential and parliamentary elections. Political parties were of the opinion that the parliamentary election would be greatly influenced if the presidential election was held first. Ershad had, however, already declared himself President of Bangladesh in December 1983.

During the process of 'civilianization' Ershad did not have to undertake any major constitutional changes. He had a version of restricted democracy almost ready-made from Zia; he inherited without any major changes, Zia's 'lame and tame' legislature. He toyed with the idea of introducing an Upper House in the legislature where he wanted to introduce professional representation of the armed forces. As pointed out earlier, he sent some of his experts to Indonesia to study the Indonesian Constitution, which grants the army a definite and statutory role. He also used to refer to the example of Turkey, where the armed forces have some role in the political order.

But very soon Ershad had to give up the idea of a second or an Upper House with an army representation. He would soon realize that the Indonesian and Turkish models would not be accepted in Bangladesh so he reconciled himself to the existing legislature as introduced by Zia. He, however, decided to do away with the parliamentary trappings of Zia's legislature with respect to the appointment of the prime minister. He made the appointment of the prime minister and Council of Ministers an absolute prerogative of the president. Under Zia the

procedure had been the same, only the constitutional language gave it an aura of parliamentary tradition.

Thus, Ershad did not have to make any major changes in the composition or role of the legislature. He inherited Zia's tame legislature which was sufficient for the continuation of limited, or controlled democracy, as is usually practised by military rulers when they lift martial law and try to give a facade of a civilian government to their rule. Such a system can be designated 'controlled democracy' or 'constitutional dictatorship.'

Out of all the Parliaments since 1973, former President Ershad's two Parliaments of 1986 and 1988, were the apogee of 'rubber stamp' parliaments. Although his rule was the longest in Bangladesh, he had difficulties in legitimizing it. The major political parties took a hard-line approach with respect to the scheduled parliamentary election. However, elections were held in May 1986. The resulting composition of the House was as follows: Jatiyo Party—221 (including women's seats and 20 independent seats); Awami League—78 (including 4 independents); Jamaat-i-Islami—10; The Communist Party of Bangladesh—6; Bangladesh National Awami Party (Bhasani)—5; Bangladesh Muslim League—4; Jatiyo Samajtantrik Dal (Shahjahan Siraj)—3; BAKSAL—3; Bangladesh National Awami Party (Muzzafar)—2; Jatiyo Samajtantrik Dal (Rob)—4; Bangladesh Workers Party—3; Independent—4; and 7 vacant seats which subsequently went to Jatiyo Party. So the total strength of the Jatiyo Party was 228 in a House of 330 seats.

Though the third Jatiyo Sangsad contained the largest parliamentary Opposition since 1973, until the election of 1991, its role and functions were most disappointing. Not only were the powers and influence of parliament curtailed, as explained before, but Ershad further damaged the status and prestige of the legislature by the widest possible rigging of elections. In Third World countries rigging of elections is a familiar phenomenon, but under Ershad it was almost wholesale removing and replacing of ballot boxes. Elections under Ershad became a farce and a mockery.

Now a legislature can function and discharge its role and responsibilities only when it is elected freely and fairly. There

are legislatures in dictatorial regimes. There was a legislature in Germany even under Hitler; similarly, there were legislatures in the now defunct Soviet Union and in the East European countries, but these legislative bodies were not really representative of the people nor could they perform the role and functions of a legislature expected in a democratic system, be it presidential or parliamentary. As such, in the absence of a healthy political order, the country was besieged with political instability. Strikes, demonstrations, and campus violence became a daily feature. In the midst of such turmoil Parliament held its sessions, but there were only four sessions in all.

The first two sessions were short and without any familiar parliamentary activities. During the second session, Parliament met only for five hours and eight minutes. Members of the main opposition parties, namely the Awami League, Jamaat-i-Islami, the Communist Party of Bangladesh, Bangladesh National Awami Party (Bhashani), Bangladesh National Awami Party (Muzzafar), Bangladesh Workers Party, and a few independents were absent (223 members were present whereas as many as 107 were absent). Only the Constitution (Seventh Amendment) Bill, 1986, and three Ordinances were laid before the House. The proceedings of the second session were almost a caricature of actual parliamentary activities. Again the rules (75(1), 78, 79 and 82) were suspended as the Bill was introduced. It took four and a half hours of deliberation with the participation of fourteen MPs (mostly from the Treasury Bench) and was passed by a division vote of 223-0. There was no walkout, or a suggestion to send the Bill to a Select Committee, or an eliciting of public opinion. The Bill which ratified and confirmed all Proclamations, Martial Law Orders, and other laws made during the period between 24 March 1982 and 10 November 1986 had a smooth sailing with some of the so-called Opposition MPs supporting it. In this regard the role of A S M Rob of Jatiyo Samajtantrik Dal was significant, for which he was subsequently rewarded.

If one makes a comparison between the passing of the Constitution (Fifth Amendment) Bill, 1979, and the Constitution (Seventh Amendment) Bill, 1986, one cannot but note that the combination of curtailment of the powers of the legislature and the malpractice of the electoral process had turned Parliament

into a completely impotent body. At least Zia's parliament used to make some noise, whereas Ershad's one did not even dare to make such moves.

But the facade was maintained, and the House received 2927 starred and 599 unstarred written questions, 13 short-notice questions, and 8 adjournment motions out of which one was discussed. Discussion on matters of public importance, and discussion on matters of urgent public importance for short-duration were accepted; some of which were attended by the House. The House only had Standing Committees and no Select Committees. As many as 21 ordinances were laid before Parliament and all were accepted. Very little time was, however, devoted to Private Members' Bills or Private Members' Resolutions which demonstrated the government's indifference to the 'largest Opposition since 1973' as the Opposition was boastfully termed by one prominent Jatiyo Party member.[79]

The functioning of the PAC seemed to be in disarray during the fourth Jatiyo Sangsad. The first PAC was formed during the martial law period on 19 October 1983, under the chairmanship of a minister. A few meetings were held before he lost his ministership. The next PAC was formed on 9 March 1985, which was chaired by A K M Nurul Islam. The C&A-G prepared 126 audit and appropriation reports (1969 to 1979-80) to be handed over to the Committee. One ad hoc Committee under Nurul Islam prepared a comprehensive report of the auditing of all departments and submitted it to the President. Only the yearly report of 1985 was laid before the House by the Committee.

The Parliament's decay was reflected in the pattern of politics in Bangladesh. The frustrated Opposition naturally took to politics of the streets. Country-wide agitations, repeated strikes and demonstrations forced President Ershad to dissolve his 1986 Parliament in December 1987.

According to the provisions of the Constitution, a new House came into being in March 1988, but this was boycotted by all major political parties. In the meantime, the time-limit for the reservation of seats for women had expired on 16 December 1987. There were debates and discussions within Ershad's ruling party whether such a reservation was necessary or desirable. The mode of election for the women's seats and their role in

the legislature had prompted a weekly to term these 30 ladies as '30 sets of ornaments in Parliament.'[79] So the debate was intense, as a faction of the Jatiyo Party thought that they would not require this solid bloc of thirty votes in the future Assembly especially after the party's 'thundering victory' in the March 1988 election (thanks to ballot-box lifting at gun-point) in which the Jatiyo Party got an absolute majority of 251, whereas the combined Opposition captured only 19; JSD (Shahjahan Siraj)—3; Freedom Party—2; Independent—25. It was alleged that the Government had to 'coax' a few independents to join the Opposition in order to have a semblance of a constitutionally-established Opposition.[80]

The issue of reservation of seats for women was settled through the passage of the Constitution (Tenth Amendment) Bill, 1990, which stipulated that there would be a similar provision for the reservation of seats for women for yet another period of ten years beginning with the commencement of the next Parliament.[81] Ironically, it would be Begum Zia, who imprisoned Ershad for various corruption changes, who would form the government with the help of these women's seats. The Jatiyo Sangsad of 1988, thus, had no reserved seats for women. A few were elected from general constituencies but not surprisingly they were all related to the stalwarts of the Jatiyo Party.

The fourth Jatiyo Sangsad passed three Constitutional (Amendment) Bills (Eighth, Ninth and Tenth), 92 ordinances, 112 acts and undertook voluminous parliamentary activities. It received 5016 starred, 987 unstarred and 15 short-notice questions, most of which were dealt with. It accepted and discussed five adjournment motions, and accepted nine half-an-hour discussions, of which four were discussed. Out of 151 motions calling attention to matters of public importance, 36 were dealt with by the statements of the concerned ministers, while 50 were discussed. It also accepted 51 discussions on matters of public importance for short-duration of which 26 were taken care of. The statistics were impressive.

The House also set-up an impressive Committee system. At the first session, eight Standing Committees, a few Select Committees and thirty-two Departmental committees with similar procedures as under Zia's system were formed. But,

Private Members' Bills were scanty. A few Private Members' Bills were introduced and an innocuous Private Members' Resolution was accepted. Interestingly there was one Private Members' Bill which was similar to the Government's Constitution (Tenth Amendment) Bill, 1990. Such consensus or meeting of the minds between the Government and the Opposition was indeed a rare phenomenon in the history of Bangladesh politics!

The PAC seemed to be 'active' during the fourth Jatiyo Sangsad. It was formed on 15 June 1988, with Shahjahan Siraj, an 'Opposition' MP as its chairman. In order to facilitate its work, it was divided into four subcommittees on 14 October 1988, which began auditing for 1984-5. The first report included 635 objections out of which 277 were resolved and the committees demanded reports from the relevant departments about the rest of the objections (as many as 358). Two reports, sent by the House, were discussed and submitted during the fourth Jatiyo Sangsad.

From the preceeding discussion, it seems that Parliament under Ershad, especially the fourth one, was performing its designated tasks. But a deeper analysis reveals that the parliamentary activities performed by a legislature which was not only constitutionally 'lame and tame,' but the legislators' very existence as MPs depended on the goodwill of the president, were nothing more than a charade. This is clear from the way important bills like Constitution (Amendment) Bills were rushed through parliament and the quality of debates they generated. The debates seemed like prearranged shows in which no vital issue of national interest or policies were discussed.

In a parliament, debates do not raise any direct issues of maladministration, but they are supposed to raise new questions and serve the purpose of Private Members' Bills with regard to specific matters of public importance. New issues raised by debates help check arbitrary policies of the executive. But the fourth Parliament's main task was to approve executive orders. The seventh session of the fourth parliament was a case in point in which the executive decision to send a contingent of troops to Saudi Arabia, during the Gulf War of 1990, was unanimously approved. Both the Treasury Bench and the

Opposition thanked the president for giving an opportunity to Parliament to discuss such a vital issue, which according to the MPs, demonstrated the fact that the Jatiyo Sangsad was the centre of all national activities as promised by the president.[82] Other parliamentary activities like adjournment motions, question hour, even the question of motion of no-confidence in the context of the executive's non-dependence on parliament for his tenure, became meaningless. On the other hand, like a genuine presidential system, the legislature did not have an independent, separate and powerful status as found in the US which in spite of all its defects, has proved to be more effective in checking the arbitrary actions of the executive than has a parliamentary legislature.[83] So Ershad's legislature was merely a parody of a true democratic one.

Legislature under the revived parliamentary system as introduced under the constitution (Twelfth Amendment) Bill, 1992.

After nine years of military rule by Ershad, a free and fair election was held in Bangladesh, the first perhaps since the creation of the country in 1971. As pointed out earlier in the chapter on the executive, there were great debates and wide discussion over the issue of parliamentary *vis-á-vis* presidential systems: whether Bangladesh should revert to a parliamentary system as introduced under the original 1972 Constitution or whether the all-powerful presidential system as introduced by the late President Ziaur Rahman through the Constitution (Fifth Amendment), 1979, should continue.

There was a famous three-party joint declaration in November 1990, in which both the BNP and the Awami League pledged for the restoration of the parliamentary system. Notwithstanding the joint declaration, the BNP did not make its stand clear on the issue of parliamentary *vis-á-vis* presidential system during the election campaigning of 1991. The Awami League, however, firmly and clearly opted for a parliamentary system.

The results of the 1991 election did not give any party an absolute majority. The BNP emerged as the single largest party

but did not have enough seats to form a government. Finally, an uneasy alliance was made between the BNP and the Jamaat-i-Islami which enabled the BNP to form the government.

The great debate over the issue of parliamentary *vis-á-vis* presidential systems now shifted to the legislature. The Awami League was adamant in its effort to establish a parliamentary system as it was in the original version of the 1972 Constitution, while the stand of the ruling party BNP was not yet clear. The Prime Minister who was also the all-powerful president of the BNP was ambiguous on this issue; she was seemingly in favour of a strong executive as introduced by her late husband President Ziaur Rahman. But many members of the BNP were not happy over the all powerful presidential system as introduced by Zia. The Secretary-General of the Party, who was also a Cabinet Minister, spoke in favour of the parliamentary system in an interview with the British Broadcasting Corporation, (BBC).[84] It soon became clear that a large section of the BNP was also in favour of switching over to a parliamentary system. The leftist parties as well as the Jamaat-i-Islami also expressed their preference for a parliamentary system.

As we have explained in our discussion of the executive, there is a myth in the South Asian subcontinent among the urban elite, in particular among the lawyers, that the only true form of democracy is the British parliamentary system. This myth is not only common in the South Asian subcontinent but also in the other newly-independent Afro-Asian countries carved out of the erstwhile British empire. So, finally, bills were introduced in Parliament to change the system of government to a parliamentary one. Although there was a consensus in favour of the parliamentary system, some differences existed over the details of the parliamentary system for Bangladesh. The Awami League wanted to revert to the 1972 version, while the BNP under Begum Zia was for a strong executive as it exists in Germany, or as it existed in Pakistan under Bhutto's 1973 Constitution, or as it still exists in Pakistan under Amendments introduced by President Ziaul Haq. A constitutional deadlock was created which was finally resolved thanks mainly to the Acting President, Justice Shahabuddin.

We have already discussed the type of the executive under the new version of the parliamentary system as introduced by the Twelfth Amendment of 1991. Let us now examine the structure and role of the legislature as a result of the Twelfth Amendment of 1991.

The structure of parliament

The structure of Parliament remained more or less the same It was composed of 300 seats with 30 additional seats reserved for women to be indirectly elected by the members of the legislature. This method is not favoured by many women as they feel, with some justification, that women thus indirectly elected do not really represent the women of the country. They would prefer to see women being elected from general constituencies, either nominated by the political parties or as independent candidates. Or they would like to have a separate women's electorate for the reserved women's seats. There are, of course, some women members including the prime minister, Begum Zia, and the leader of the Opposition, Sheikh Hasina, who have been elected from general constituencies as nominees of their parties.

The relationship between the executive and legislature under the new version of the parliamentary system of 1991

In a parliamentary system the cabinet, headed by a prime minister as it originated in England and spread to other parliamentary systems such as those of Australia, Canada, and India, is the holder of real executive power. The expression 'the Cabinet shall be collectively responsible to Parliament' is in the new version of the parliamentary system in Bangladesh.[85] We have already explained the meaning and connotation of this expression, familiar in all true forms of parliamentary democracy; it means that the cabinet shall hold office as long as it enjoys the 'daily' confidence of the legislature.

Thanks to the growth of modern well-disciplined parties, the prime minister and any member of the cabinet, or the cabinet as a whole, remains in office as long as he or she enjoys the confidence of the majority party or the majority coalition parities. The president appoints as prime minister 'the member of Parliament who appears to him to command the support of the majority of the members of Parliament.'[86] As mentioned earlier, President Ershad dropped the words, 'who appears to him to command the support of the majority of the members of Parliament.' The restoration of this phrase is in tune with the spirit of the parliamentary system. But it is still a subjective power of the president. The system would be more effective if it provided that a ministry might not be formally appointed until it had received a vote of confidence within a certain period, say thirty or sixty days. Such a provision is found in the French Fourth Republic Constitution. Similarly, in some forms of the parliamentary system, the president cannot dismiss a cabinet unless an alternative one has been selected by the legislature, as it is in Germany; this is termed 'constructive vote of no-confidence.'

Under the Twelfth Amendment of 1991 the office of the prime minister shall become vacant (a) if the prime minister resigns or (b) if he ceases to be a member of Parliament.[87] It further lays down that if the prime minister ceases to retain the support of a majority of the members of Parliament, he shall either resign his office or advise the president to dissolve Parliament.[88] Is the president bound to accept the advice of a prime minister who has lost the confidence of a majority of the legislators? The Twelfth Amendment provides that the president shall dissolve the House only when he is satisfied that 'no member of Parliament commands the support of the majority of members of Parliament.'[89] So the president is not absolutely bound to accept the advice of a defeated prime minister. The legislature, thus, has some role in the dismissal of a prime minister and his cabinet.

But the independence and free choice of the members of Parliament is severely curtailed by Article 70, which lays down: (1) A person elected as a member of parliament at an election at which he was nominated as a candidate by a political party shall vacate his seat if he resigns from that party or votes in

parliament against that party. If a member of parliament, either (a) being present in parliament abstains from voting, or, (b) absents himself from any sitting of parliament, ignoring the direction of the party which nominated him for the election not to do so, he shall be deemed to have voted against that party. The same procedure is applicable to independent members who would join any of the parliamentary parties.[90] Such stringent curtailment of the powers of the legislators was provided under the Fourth Amendment which was severely criticized by the political parties of all shades including the BNP. This time it was argued that such provisions to curtail the free choice of a member of parliament may not be in tune with the true form of the parliamentary system as it originated in England. But thanks to the lack of well-disciplined and well-organized parties in the 'new' democracies, such provisions are found in the Constitutions of India, Pakistan and others. Crossing of the floor is a frequent phenomenon in new' democracies, so this restrictive clause is a painful necessity for preventing political instability. In India, however, the provisions are not so stringent. Moreover, the existence of democratized political parties and strong parliamentary committees have successfully countered the loss of freedom of the individual member.

Can a group of the members of a parliamentary party inside parliament revolt and form a dissident group, i.e., does a group, as opposed to the individual member, have the right to dissent? Under the Twelfth Amendment, even such group disloyalty or the right of a group inside the legislature has also been prevented under the following provision: 'If, at any any time, any question as to the leadership of the parliamentary party of a political party arises, the Speaker shall, within seven days of being informed of it, in writing, by a person claiming the leadership of the majority of the members of that party in parliament, convene a meeting of all members of parliament of that party in accordance with the Rules of Procedure of parliament and determine its parliamentary leadership by the votes of the majority through division and if, in the matter of voting in parliament, any member does not comply with the direction of the leadership so determined, he shall be deemed to have voted against that party under clause (a) and shall vacate his seat in the parliament.'[91] So once a prime minister is

appointed, the legislature has very little, if any, power to remove him. This is a departure from the true spirit and practice of a parliamentary democracy and a curtailment of the power of the legislature to make or unmake the executive which is an important feature of the parliamentary system.

As we have pointed out, control over public money is one of the essential, if not the most important means available to a legislature for controlling the executive branch. In England, the land of the classic parliamentary system, the King used to summon the legislature whenever he needed money. While discussing the ways and means for a parliament to control or restrain the executive, K C Wheare in his book, *Legislatures*, points out that debate on financial matters is a crucial weapon in the hands of the legislature for what he terms 'making the government behave.' So the unqualified power of the legislature on financial matters is regarded as an important feature of the supremacy of the legislature.

We have already pointed out how the late President Ziaur Rahman curtailed the power of the legislature in financial matters by providing that if Parliament in any financial year 'fails to make any grant,' then the president would have the power to draw from the Consolidated Fund, the necessary funds for a period not exceeding 120 days, stipulated in the Annual Financial Statement for that year. We have criticized this as curtailment of parliament's control over financial matters and pointed out that it was a legacy of the powers of the British Governor-General during the British Raj, and that the first martial law ruler of the subcontinent, Ayub Khan, also retained such powers in his 1962 Constitution. It is rather disappointing to see that such a curtailment of power with respect to financial control has been retained under the Twelfth Amendment of 1991, which was framed by a Parliament elected through a free and fair election. Under the current provision, Article 92 of the Constitution lays down: 'Notwithstanding anything contained in the foregoing provisions of this chapter, if, with respect to the financial year, Parliament: (a) has failed to make the grants under Article 89 and passed the law under Article 90 before the beginning of that year and has also not made any grant in advance under this Article; or (b) has failed to make the grants under Article 89 and passed the law under

Article 90 before the expiration of the period for which the grants in advance, if any, were made under this Article, the President may, upon the advice of the Prime Minister, by order, authorize the withdrawal from the Consolidated Fund, money necessary to meet the expenditure specified in the financial statement for the year, for a period not exceeding 60 days in that year, pending the making of the grants and passing of the law.'

The late President Ziaur Rahman had also curtailed the powers of parliament with respect to international treaties when he declared that international treaties, which the president would consider not appropriate to be presented to parliament on the grounds of 'national interests,' would not be put before parliament. Let us see what this curtailment of the powers of the legislature on the ground of 'national interests,' involves.

Under the Twelfth Amendment, there is a definite improvement with regard to the powers of parliament with respect to international treaties: under a new Article 145A it is provided that all treaties with foreign countries shall be submitted to the president, who shall then cause them to be laid before parliament. But a safeguard has been inserted, by providing that 'such a treaty connected with national security shall be held in secret session of parliament.' This is quite understandable and is also justified because there may be some sensitive elements in an international treaty which should not be discussed in public but nothing should be withheld from parliament itself. So this improvement with respect to making international treaties is generally welcomed.

As with past parliaments, powers have been given for regulating: (a) the raising and maintaining of the defence services of Bangladesh and other reserves; (b) the granting of commissions therein; (c) the appointment of chiefs-of-staff of the defence services, and establishing their salaries and allowances; and (d) discipline and other matters relating to those services and reserves. Until parliament by law provides for the matters specified in clause (1) the president may, by order, provide for those that are not already subject to existing law. This is a normal function of parliament in a democratic system.

Similarly, it is provided under Article 63, that war shall not be declared and the Republic shall not participate in any war

except with the assent of parliament. These are some aspects of the composition, functions, and role of parliament in the new parliamentary system as introduced under the Twelfth Amendment of 1991.

Functioning of the legislature as introduced under the revised parliamentary system, 1991.

As mentioned earlier, a free and fair parliamentary election took place on 28 February 1991. The distribution of seats among the political parties stood as follows: BNP—170 (including the 28 women's seats it won due to its alliance with the Jamaat-i-Islami); Awami League and BAKSAL (which later merged with the AL—92; Jatiyo Party—35; Jamaat-i-Islami —20 (including two women's seats); Communist Party of Bangladesh—5; Bangladesh Workers' Party—1; Ganatantri Party—1; Islami Oyyoko Jote—1; Jatiyo Samajtantrik Dal JSD (Shahjahan Siraj)—1; National Democratic Party—1; National Awami Party (M)—1; and Independent—1. It was heartening to see that there was a constitutionally established Opposition in the fifth Parliament of Bangladesh.

The proceedings of the House have been lively since its first session. A number of important bills like the Constitution (Eleventh Amendment, Twelfth Amendment and Thirteen Amendment) Bills, 1991, have been introduced and passed by the legislature. Unlike the previous experiences, important bills like the Twelfth Amendment Bill, 1991, were sent to the Select Committee and adopted only after a consensus was reached through the Select Committee. A Private-Member Bill on the judiciary has also been sent to the Select Committee, and a notice by the government on a bill titled Anti-terrorist Bill was not allowed to be introduced (but was later sent to a Select Committee). It seems that thanks to the presence of the Opposition, the government is not having as smooth a sailing with its each and every action in the House, as the previous executives had.

It has, however, to be pointed out that the government still has a tendency to bypass Parliament, the latest example being the Upzilla Ordinance. This issue of vital national interest was

not discussed in the House and was laid before the House in the form of a bill which was passed under the constitutional provisions of Article 70. Likewise, the government also bulldozed an unpopular bill entitled Special Security Force, 1992, within hours, and in the midst of an Opposition walk-out.

The fifth Parliament, however, is allotting more time to Private Members' business. Nonetheless, most Private Members' Resolutions get cancelled due to the shortage of time. This tendency is not encouraging. In a democracy, the Opposition is very much a part of the government and should not be brushed aside. To make the House effective, both the Opposition and the Treasury Bench should work hand in glove. The Opposition, on the one hand, does not act like a responsible Opposition. It seems that instead of making the House a public forum the Opposition is using it to settle past scores. No wonder it has been termed by the international press as the 'haunted Opposition.'[92] Instead of insisting on the repeal of the Special Powers Act or exposing the government's mistakes or economic mismanagement to the public, it is busy with issues like repeal of the Indemnity Bill, 1975, and non-political issues like the Golam Azam issue. During the fifth session of the House, out of 88 adjournment motions, only 14 were related to the Rohingha refugee problem whereas 44 were with reference to the Golam Azam issue.

On the whole, however, it should be pointed out that parliamentary activities, debates as well as sensitivity to public opinion by the peoples' representatives, have been moderately successful. The return of the Awami League to the House after its brief spell of boycott over the *Ganoadalot* issue and regular attendance in Parliament by the Prime Minister (she had previously been criticized for her irregular attendance) are cases in point. Such susceptibility to public opinion should increasingly enhance the Parliament's image.

Recently, the Opposition has also successfully highlighted the government's alleged failures in foreign policy and in providing security for the life and property of the citizens of Bangladesh. There were full-dress discussions on both foreign policy[93] and on the deteriorating law and order situation.[94] The discussion on the budget was lively, with 233 members participating and as many as 7000 cut motions before the House.

The media, Press and public all seemed to have taken an interest in the vital issue of developmental programmes as enumerated in the budget.[95] Attempts by an Opposition MP to censure an individual minister for his alleged nepotism and corruption and a proposed amendment to the Rules of Procedure requiring that the prime minister face the House once a week are bold steps in the right direction. In Great Britain it is the standard practice that the prime minister twice a week answers questions in the House encompassing his or her entire administration.

A most interesting development is the recent tabling of a motion of no-confidence on nine counts against the government by the Opposition[96] which has been accepted by the House. As we all know, thanks to the built-in majority of the ruling party, the motion of no-confidence is not an end in itself. But this is a significant parliamentary development since its inception. It will at least, expose the transparency of the government on matters of public interest, both economic and political.[97]

But the legislature's actual control over the executive is not yet satisfactory. Its committee system needs a thorough over-hauling. It is commendable that it has been sending important bills to the appropriate Select Committees, but its Standing Committees, especially the PAC and the Departmental Committees, are not efficient enough to keep a check on the executive. The PAC is still chaired by a Treasury Bench MP and the Departmental Committees are headed by the concerned ministers including the non-MP ministers. The fact that non-MP ministers have been denied voting rights is not sufficient to make these committees do their real job. Most Departmental Committees are busy with micro-level administrative management rather than with initiating policy, which is needed for debates and for scrutinizing departmental mismanagement. An office of Ombudsman needs to be established.

Parliamentary democracy has, however, been established in Bangladesh in 1991 with a sovereign parliament. In spite of a few constitutional provisions which curtail some of the legislature's powers and influences, people in general are hopeful about its success and effectiveness due to the presence of a powerful Opposition in the House. But in order to have the House perform its main function its committee system, especially the Departmental Committee system, needs to be strengthened.

To establish full parliamentary control over public expenditures, its PAC needs to be reorganized with 'an executive arm' similar to the General Accounting Office attached to the US Congress. The C&A-G's office, keeping in line with the British system, should be made independent of the executive branch and responsible to the legislature. Besides these developments, the factor which would make the legislature effective is democratization within the political parties. Unless the leaders are susceptible to public opinion, the legislature's main task, i.e., to check the arbitrary actions of the executive, will remain as elusive as ever.

NOTES

1. Butt, Ronald, *The Power of Parliament*, (London), 1968, p. 31.
2. Locke, John, *Second Treaties on Civil Government*, Chapter. XI, and Montesquieu, *Spirit of Laws*, Book XI, Chapter. 8.
3. Blondel, J, *Comparative Legislatures*, (New Jersey: Prentice-Hall, Inc., 1973), p. 4.
4. Bryce, Lord James, *Modern Democracies*, (London: Macmillan Co Ltd., 1921), p. 367-77, Chapter. 59.
5. Muir, Ramsay, *How Britain is Governed*, (New York: Richard R. Smith Inc., 1930).
6. Jennings, Ivor Sir, *Parliament*, (London: Cambridge University Press, 1969).
7. Blondel, J, op. cit, p. 6.
8. *Blondel, J*, op. cit, p. 5.
9. For details, see, Choudhury, G W, *Democracy in Pakistan*, (Vancouver, Canada : University of British Columbia, 1963); and Morris-Jones, W H, *Parliament in India*, (London-New York-Toronto) Longmans Green & Co, 1957) pp. 43-71.
10. Choudhury, G W, *Constitutional Development in Pakistan*, op. cit, p. 206.
11. Draft Constitution prepared by Sir Ivor Jennings, cited in Choudhury G W, *Constitutional Development in Pakistan*, op.cit, p. 213.
12. Khan, Mohammed Ayub, *Friends not Masters*, (Lahore : Oxford University Press, 1967).
13. For details, see, Sayeed, Khalid B, *The Political System in Pakistan*, (Boston : Little Brown Ltd., 1967).
14. Article 65(2) of the Constitution of Bangladesh, 1972.
15. Debates of the Constituent Assembly, Vol. 2, No. 9, 25 October 1972. (Mr. Manobendra Larma's speech at the CA, 1972).
16. For details, see, Ahmed, Abul Mansoor, *Amar Dekha Rajnitir Panchas Basar* (Fifty Years of Politics as I saw it), (Dhaka : Nawroze Kitabistan, 1975).
17. Article 74(1) & (3).
18. Article 74(1) & (2).
19. Bondel, J, op.cit, p. 31.

20. Article 75(1A).
21. Article 78(1) & (5).
22. Elaui, Heinz, *Journeys in Politics*, (Indianapolis-New York : The Bobbs-Merrill Company, Inc., 1963), p.221.
23. Silk, Paul, & Rodhri, Walters, *How Parliament Works* 2nd ed., (London-New York-Toronto : Longmans Green & Co, 1982).
24. Silk, Paul, & Rodhri, Walters, op.cit,pp. 225-230.
25. *For details, see, Silk, Paul, & Rodhri Walters*, op.cit, and Blondel, J, op.cit.
26. Silk, Paul, & Rodhri, Walters, op.cit.
27. Article 80(1) & (2).
28. Article 80(3),(4) & (5).
29. Article 81(3).
30. Article 82.
31. Article 93(1),(2),(3) & (4).
32. Article 85.
33. Article 87.
34. Article 87(2).
35. Article 88.
36. Article 89(1).
37. Article 89(2).
38. Article 91(a) & (b).
39. Bagehot, Walter, *The English Constitution*, op.cit, pp. 117-119.
40. Jennings, Sir Ivor, *Parliament*, op.cit.
41. May, Erskine T, (ed., Sir Charles Gordon), *Parliamentary Practices*, 20th Edition, (Butterworths, 1983).
42. Rules of Procedure, *Bangladesh Jatiyo Sangsad*, Chapter. VIII.
43. Jennings, Sir Ivor, op.cit, pp. 106-107.
44. *Rules of Procedure*, op.it, Chapter. X.
45. Morris-Jones, W H, *Parliament in India, op.cit*, p. 228.
46. Rules of Procedure, op.cit, Chapter. XX.
47. *Ibid*, Chapter. IX.
48. *Ibid*, Chapter. XII.
49. *Ibid*, Chapter. XV.
50. Presidential Order No. 17, 1973.
51. Morris-Jones, W H, *Parliament in India*, op.cit, p. 324.
52. *Ibid;* p. 326.
53. Jennings, Sir Ivor, *op.cit*, p. 117.
54. Wheare, K C, *Legislatures*, (London-New York : Oxford University Press, 1967).
55. *Jatiyo Sangsad Debates*, Vol. 3, No. 5, 25 September 1973, pp. 174-180.
56. Morris-Jones, W H, *op.cit*, p. 230.
57. *Ibid;* pp. 322-23.
58. *Jatiyo Sangsad Debates*, Vol. 1, No. 2, 1975, p. 41.
59. Ibid; p. 42.
60. Ibid; p. 4.
61. Unfortunately, the copy of that Adjournment Motion was not available; as such the contents of the motion remain unknown.
62. Based on personal interview.

63. *The Comptroller & Auditor-General Ordinance*, 1972 (P.O. 15 of 1972).
64. *Proceedings of the Constituent Assembly*, 1972, p. 28.
65. Article 7, *Constitution (Fourth Amendment) Bill*, 1975.
66. Article 12, Ibid.
67. Amended Article. 53(2) (3) & (4) under the *Constitution (Fourth Amendment) Bill*, 1975.
68. *The Representation of the People (Seats for Women) Order (Amendment) Ordinance*, 1979.
69. Rossiter, Clinton, *The American Presidency*, Baltimore : The Johns Hopkins University Press, 1987), p. 30.
70. Wheare, K C, *Legislature*, (London-New York : Oxford University Press, 1967), p. 107.
71. Choudhury, G W, *Constitutional Development in Pakistan*, 2nd ed., (London : Longmans Green, 1969), p. 214.
72. Based on personal interview.
73. Wheare, K C, op.cit; Wheare, however, believes that in spite of the negativism of an irresponsible Opposition, it is more efficient in checking the executive than the responsible one found in the parliamentary system.
74. Article 145.
75. *The Bangladesh Gazette Extraordinary*, Dacca, 9 April 1980.
76. Wheare, K C, *Legislatures*, op.cit, p. 91.
77. *Jatiyo Sangsad Debates*, Vol. 1. No. 1, 2 April 1979, pp. 32-33.
78. *The Proclamation (Third Amendment) Order*, 1984, Article. 2(a).
79. *Weekly Jai Jai Din*, 2nd year, No. 2, 29 July 1986.
80. Based on personal interview.
81. *The Bangladesh Gazette Extraordinary*, 23 June 1990.
82. *Jatiyo Sangsad Debates*, 25 August 1990.
83. Wheare, K C, *Legislatures*, op.cit, 96.
84. Salam Talukardar's (General Secretary of the Bangladesh Nationalist Party) interview with BBC on 3 March 1991.
85. Articles 3 & 5(3).
86. Article 56(3).
87. Article 57(1).
88. Article 57(2).
89. Ibid.
90. Article 70(3).
91. Article 70(2).
92. *International Strategies*, November/December, 1991.
93. *The Bangladesh Observer*, 28 July 1992.
94. Ibid, 30 July 1992.
95. *Weekly Holiday*, 7 July 1992.

The Judiciary

An independent judiciary free from the control of the executive is regarded as the *sine qua non* of any form of democratic constitution. One of the fundamental objectives of a constitutional state is to preserve and foster the basic rights of its citizens. The need for a judicial organ has been recognized from time immemorial. As a noted legal commentator, Alan Gledhill stated that the judiciary is 'Weaker than either the executive or the legislature, it does not make decisions on matters of public policy, does not control the public purse, does not command police and armed forces; it rulings are liable to be set at naught by legislation, and for the execution of its judgement it must ultimately rely on the executive. It is even in danger of being influenced or flouted by the executive or the legislature. Yet the constitution makes the judiciary its guardian, and requires it to enforce restrictions, often inconvenient, on the powers of the executive and legislature.'[1]

Necessity of judicial organs

Considering that one of the primary objects for which a state was established, was the creation and protection of individual rights, the necessity of a judicial organ or organs as the means through which this object might be accomplished has been recognized from early times. A society without a legislative organ is conceivable, and indeed fully developed legislative organs did not make their appearance in the life of the state until modern times, but a civilized state without judicial organs and machinery is hardly conceivable. In the absence of legislative organs the courts might apply rules derived from other sources, for example, from their own previous decisions or from customs,

as they did in fact in many early communities. But it is impossible to imagine any satisfactory substitute for courts of justice. 'It is indispensible,' said an eminent American jurist, 'that there should be a judicial department to ascertain and decide rights, to punish crimes, to demonstrate justice, and to protect the innocent from injury and usurpation.'[2]

In order to enable the superior courts of a democratic country to perform their basic role, the tenure of their office as well as the terms and conditions of their office are usually protected by statutes in the constitution itself. If they are to hold office or 'court during the pleasure of the President,' i.e., the executive, there cannot be any really independent judiciary. We therefore find that while most other public servants, civil or military, hold office 'during the pleasure of the President,' the judges hold office while they are on 'good behaviour,' i.e., not guilty of any crime known to the law, and their tenure is therefore not subject to the fluctuations of electoral results as are the other two branches of government.[3]

There are, however, a few exceptions to this rule of permanent tenure of the judiciary, such as in Switzerland and in the case of some lower courts in the United States. But generally speaking, we may say that an independent judiciary is secured in a modern constitutional state by providing elaborate provisions in the constitution itself relating to its permanent tenure and unalterable terms and conditions. There may be changes in conditions such as salary, housing, etc., favourably, but not adversely.

Origin of the power of judicial review

It was in the United States that the power of the judiciary to declare any law of the legislature or any order/action of the executive as unconstitutional, or *ultra vires* originated. The power of judicial review was not originally provided in the United States Constitution but it grew out of a famous case, *Marbury v Madison*, decided in 1803, by Chief Justice Marshall.

What does the power of judicial review imply

An American scholar, Henry J Abraham, has explained it well: 'Briefly stated, judicial review in the United States comprises the power of any court to hold unconstitutional and hence unenforceable any law, any official action based on a law, or any other action by a public official that it deems upon careful, normally painstaking, reflection and in line with the canons of the taught tradition of the law as well as judicial self-restraint to be in conflict with the basic law, in the United States, and its constitution. In other words, by invoking the power of judicial review, which, of course, may 'approve' as well as 'veto' a court applies the superior of two laws, which at the level of the federal judiciary of the United States signifies the constitution instead of legislative statute or some action by a public official allegedly or actually based on it.'[4] Another American author, Christopher Volfe, gives a resumé of what he calls the 'rise of modern judicial review.' He divided the evaluation of the judicial review in the United States into three stages: the first stage, which he calls that 'traditional era,' began with the establishment of the United States Constitution in 1789, and lasted until some time in the late nineteenth century. During this period he is of the opinion that judicial review meant simply giving preference to the rule of the Constitution over any legislative or executive Act that conflicted with it.

The second stage of the judicial review, occurred when according to the author, the Supreme Court (with widespread support in the legal profession), adopted a particular understanding of property rights guaranteed by national law, that of *laissez-faire* capitalism. On the basis of the political philosophy it struck down many attempts to regulate economic affairs in the period from 1890 to 1937.[5]

The transition from the second to the third era of the American judicial review was partially obscured. That a dramatic change had occurred in 1937, no one doubted. It was a 'Constitutional Revolution, Ltd.,' as the noted legal commentator, Edward Corwin, called it. In the years immediately preceding 1937, the Supreme Court had employed the due-process clause and the commerce clause to strike down a good deal of state legislation, and more important, significant chunks of the New

Deal. In 1937, 'after Franklin Roosevelt's court-packing proposal, the court swung about and upheld controversial legislation, and afterwards, its ranks swelling with Roosevelt appointees, it virtually abdicated serious review of economic regulations.'[6]

The power of the judicial review in the United States has been resented and criticized and attempts were even made to curtail it or to modify it in recent years. As a result of the power of the judiciary, the legislative organ of the United States is sometimes described as having three chambers: (1) The House of Representatives (2) The Senate and (3) the Judiciary. It is also alleged in certain quarters that a nine-person judicial body can frustrate the peoples' will, as expressed by the Congress. It is also called sometimes an instrument of conservatism or anti-liberalism but nothing has yet challenged successfully its authority or power.

On the contrary, the principle of judicial review has spread to the constitutions of many other countries including those of the Third World countries. India and Pakistan are two such instances in our own subcontinent. It has usually been adopted in federal constitutions where the judiciary acts as an umpire in disputes of overall authority between the federal government and the federating units, but even in non-federal countries like France under the Fifth Republic it has penetrated into the constitution, though not in the same form as in the United States. So, we may conclude this part of our discussion by pointing out that an independent judiciary with power to interpret the constitution and to protect the fundamental rights of the citizens is a common and striking feature of the modern democratic state. We now turn to an examination of the judicial system of Bangladesh since 1972

Judiciary under the original 1972 constitution

In the preceding pages we have pointed out the importance of the judiciary in any form of constitutionalism or democracy. The most reputed sociologist of modern time, R M Maclver says that in all democracies, judicial institutions play a significant part, for the spirit of democracy lies in the fundamental law, the law that elevates community above the state. He rightly

says, 'We do not define democracy by its spirit since democracy is a form of government, but men have struggled for democracy not for the sake of form but for the way of life that it sustains.'[7]

In our subcontinent we find that independence of the judiciary stands as a principle which is cherished and valued by the people. It is perhaps one of the beneficent legacies of British justice or rule of law, as Dicey describes it. In undivided Pakistan, we find that democratic institutions like the legislature or executive were subjected to many limitations and had to face stresses and strains under the form of direct military rule or indirect constitutional autocracy as introduced by Ayub Khan in the 1962 Constitution but the judiciary was, on the whole, one of the lesser casualties of authoritarianism, even under 'controlled democracy.' Even in Ayub Khan's 1962 Constitution, we find that the judiciary was given a respectable place.

In Bangladesh when the people, the then East Pakistanis, were struggling for a separate state of their own, the independence of the judiciary was stressed again and again. In the original 1972 Constitution, we find (under Article 22) that the independence of the judiciary was clearly emphasized. It laid down that the state must ensure the separation of the judiciary from the executive organ of the state, an idea originally conceived by the British. However, oversight of an independent and effective judiciary can play havoc in restraining the arbitrary actions of the executive in a country like Bangladesh with a legacy of strong executives. Two factors have created impediments in creating an independent and efficient judiciary: (1) the judiciary in Bangladesh has been intermittent and ad hoc, i.e., like the other political institutions of the country, its gradual evolutionary process was interrupted and disrupted by the imposition of authoritarian rule in January 1975 and martial law in 1975 and 1982. This was, however, not visualized by the framers of the 1972 Constitution.

On the contrary, when Bangladesh was engaged soon after its liberation in framing a constitution the idea of an independent judiciary was almost a foregone conclusion. It was felt that for too long the people of Bangladesh had been deprived of their fundamental rights, previously under the British and then under the Pakistanis. A new era was about to begin as the judiciary was thought to be a vehicle for enforcing fundamental

rights as well as helping the executive to carry out a social revolution within its constitutional ambit. Part VI of the original 1972 Constitution dealt with the judiciary. While there was unanimity about an independent judiciary there were, however, certain issues which had to be decided. Both in the Indian and Pakistan Federal Constitutions, elaborate provisions were made to ensure an independent judiciary. In a federal constitution the judiciary has an added role; a federal court is an essential ingredient in a federal constitution. It acts as the guardian of the constitution because in a federal constitution the task of umpiring the application of the constitution is vested in the judiciary. It acts in disputes between the federation and federating units with regard to the jurisdiction of the authorities of the federation and that of the federating units. Division of powers, legislative, financial and administrative, is a fundamental characteristic of a federal constitution. Judicial interpretation in a federal system has great impact on a developing and unfolding federal constitution as has happened in the US, Canada and in many other federal constitutions.

But Bangladesh has from the beginning been established constitutionally as an unitary government. It was therefore felt, and not without justification, that the country need not have two establishments, a Supreme Court and High Court. In order to reduce the complexity and expenditure, Bangladesh therefore opted for one Supreme Court with two divisions: one Appellate and the other High Court. The former was to act as the highest court and the High Court Division would exercise the function of the former Dhaka High Court of the Pakistan judicial system. Therefore the judicial system as introduced in the 1972 Constitution was simpler and less expensive compared to the judicial system in undivided Pakistan. There would be only one Chief Justice of the Supreme Court as a whole. The Chief Justice and the other judges of the Appellate Division would sit only in that division and the rest of the judges were to sit in the High Court Division.

As we have pointed out in our introductory remarks on the judiciary, the independence of the judiciary can only be secured by the method of its selection, its tenure and other terms and conditions of service. A judiciary cannot perform its independent role if its tenure is dependent on any of the other two branches

of the government, namely the executive and the legislature. The usual provisions to ensure the independence of the judiciary are as follows:

(1) the salaries and pensions of the judges of the Supreme Court, its officers and staff, and its administrative expenses, are not subject to the vote of the Assembly; they are charged to the Consolidated Fund; (2) judges remain in office until a certain age. In the US the judges are appointed for life, but in the Indian subcontinent that is not the tradition; (3) the remuneration and conditions of service of the judges of the Supreme Court and High Court may not vary to their disadvantage after their appointment; their conduct may not be discussed in the legislature, except on a motion to remove a judge of the Supreme Court; (4) immunity of the judges, i.e., conditions for removal etc; (5) an ex-judge is forbidden to practice in the bar but he could be appointed Attorney-General, Advocate-General, or Provincial Governor.

These provisions ensure that a judge is dedicated to his office; his opportunities in other walks of life being thus limited, his judgement is less likely to be influenced by considerations of personal advantage.[8] Article 95 of the 1972 Constitution provided that the Chief Justice and other judges were to be appointed by the president. Article 96 provides that these judges shall hold office until they attain the age of sixty-two. It further laid down that a judge could not be removed from office except in accordance with statutory provisions of Article 96, which stipulated that:

(1) A judge shall not be removed from office except by an order of the president passed pursuant to a resolution of Parliament, supported by a majority of not less than two-thirds of the total number of members of Parliament, on the grounds of proved misbehaviour or incapacity. (2) Parliament may by law regulate the procedure in relation to a resolution under clause (2) and for investigation and proof of the misbehaviour or incapacity of a judge[9]

So we find that the tenure of the office of judges was properly protected and judges would in fact hold the office during the terms of 'good behaviour.' This is the usual expression for protecting the tenure of judges.

As regards the jurisdiction of power of the court, it was

provided in Article 101 and 102 which laid down that the High Court Division shall have such original Appellate Court and other jurisdiction and functions as are or may be conferred by the Constitution. Article 103 provides 'The Appellate Court shall have jurisdiction to hear and determine appeals from judgement decrees, and orders or sentences of the High Court Division.' The usual criteria for an appeal to the Appellate Division from the High Court Division were laid down in Article 103, sub-section 2. Article 106 gives 'advisory jurisdiction' to the Supreme Court. It says if at any time it appears to the president that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the Division may, after such hearings as it thinks fit, report its opinion thereon to the president. This 'Advisory jurisdiction' has never been used at all by the president in Bangladesh, whereas in India as early as 1950, President Rajendra Prasad sought the Supreme Court's 'Advisory jurisdiction' with regard to the Hindu Penal Code which was pending before Parliament.[10] The Indian leadership, thus, from the beginning stressed the importance, status and practices of their court system, an element vital in establishing an impartial, objective, independent and courageous judicial institution.

A highly important role of the judiciary is to protect the fundamental rights of the citizens of the country by exercising what is known as the *writs jurisdiction*, including writs in the nature of *habeas corpus, mandamus, prohibition, quo waranto* and *certiorari* or any others of them. In undivided Pakistan the Interim Constitution, under the Government of India Act 1935, as adopted under the Indian Independence Act 1947, the judiciary had no writs jurisdiction, but on 6 July 1954 an amendment was made to the Interim Constitution by which the High Courts were given writs jurisdiction. As a result of this new jurisdiction, the court could order a person, authority, or government to do anything or refrain from doing anything for any purpose. It was rightly described as the foundation of the rule of law in undivided Pakistan.

In the case of Bangladesh, the 1972 Constitution had provided the much desired writs jurisdiction but there was a saving clause

under Article 47: '(1) No law providing for any of the following matters shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges, any of the rights guaranteed by this Part; (a) the compulsory acquisition, nationalization or requisition of any property, or the control or management thereof whether temporarily or permanently; (b) the compulsory amalgamation of bodies carrying on commercial or other undertaking; (c) the extinction, modification, restriction or regulation of rights of directors, managers, agents and officers of any such bodies, or of the voting rights of persons owning shares or stock (in whatever form) therein; (d) the extinction, modification, restriction or regulation of rights to search for, or, win minerals or mineral oil; (e) the carrying on by the Government or by a corporation owned, controlled or managed by the Government, of any trade, business, industry or service to the exclusion, complete or partial, of other persons; or (f) the extinction, modification, restriction or regulation of any right to property, any right in respect of a profession, occupation, trade or business or the rights of employers or employees in any statutory public authority or in any commercial or industrial undertaking; if Parliament in such law (including, in the case of existing law, by amendment) expressly declares that such provision is made to give effect to any of the fundamental principles of state policy set out in Part II of this constitution.

(2) Notwithstanding anything contained in this Constitution the laws specified in the First Schedule (including any amendment of any such law) shall continue to have full force and effect, and no provision of any such law, nor anything done or omitted to be done under the authority of such law, shall be deemed void or unlawful on the ground of inconsistency with, or repugnance to, any provision of this Constitution.

Provided that nothing in this article shall prevent the modification or repeal of any such law or provision by Act of Parliament, but no Bill for such an Act, if it contains provision for or has the effect of divesting the State of any property, or of enhancing any compensation payable by the State, shall be presented to the President for assent unless it is passed by the votes of not less than two-thirds of the total number of members of Parliament.'

The first assault on the independence of the judiciary in Bangladesh

A dictatorial regime and an independent judiciary are not compatible. In fact, they are anathema to each other. So when Sheikh Mujibur Rahman introduced through the Fourth Amendment of the Constitution a one-party dictatorship and buried parliamentary democracy in January 1975, the judiciary was also a victim of authoritarianism. Major changes were made in Part VI of the Constitution which dealt with the judiciary. The tenure, power, function, etc., of the Supreme Court were drastically changed in order to bring it in tune with the dictatorial regime set up as a result of the Fourth Amendment. We have noted that under Article 22 of the original 1972 Constitution there was separation of the judiciary from the executive.

Now the entire system relating to the judiciary of the country was mutilated for the sake of the newly-established dictatorial regime. The terms of Article 95 were changed with the following words: 'The Chief Justice and other judges shall be appointed by the President.' The original provision was that while the Chief Justice was to be appointed by the president, the other judges would be appointed by the president 'after consultation with the Chief Justice.' The words 'after consultation' with the Chief Justice were removed.

Far more serious was the new system of removing the judges. We have pointed out that judges cannot perform their independent role unless they are assured of their permanent tenure. If judges, like other public servants, were to hold office during the pleasure of the president then there cannot be an independent judiciary. That is why Article 96 provided a very rigid procedure for removing judges. But the Fourth Amendment removed those safeguards for the tenure of the judges and simply provided that a 'judge may be removed from his office by order of the President on the grounds of misbehaviour or incapacity.' A provision was only added that the dismissed judge would be given reasonable opportunity to show cause against his dismissal. Thus the permanent tenure of judges which is vitally needed for ensuring the independence of the judiciary, was removed.

The power and authority which were given to the Supreme Court in Article 116 for the control and discipline of its members, including the power of posting, promotion, etc., of the sub-magistrate were taken away from the Supreme Court and were now vested in the president.

Another unfortunate curtailment of the power of the judiciary concerned Article 103, i.e., the writs jurisdiction of the High Court Division. In the original version of the Constitution, the Supreme Court was given power to protect fundamental rights by issuing writs, but the Fourth Amendment took away the power of the Supreme Court and provided for the creation of a so-called 'Supreme Constitutional Court' for the enforcement of the fundamental rights. An author has pointed out that: 'Mujib was aiming at establishing the old colonial system.'[11] Article 115 was amended by providing that appointments of personnel to office in the judicial service or a magistrate exercising judicial function would be made by the president in accordance with the rule made by him. The original provision that all these appointments were to be made in consultation with the Supreme Court was removed. Similarly, the power and control and discipline of the lower courts which were vested in the Supreme Court was now vested in the president 'in accordance with the rule made by him in that behalf.' After making all these restrictions about the tenures, powers and functions as well as the role of the judiciary, a new clause was added: Article 116A, which laid down that 'subject to the provisions of the Constitution all personnel employed in the judicial service and all magistrates shall be independent in exercise of their judicial function.' So we find that with the emergence of a one-party dictatorship under the Fourth Amendment, the independence of the judiciary was ended.

Judiciary under the first martial law regime in Bangladesh

The judiciary and rule of law are complementary and go hand in hand. Now martial law means, in a sense, the negation of the rule of law. Therefore, martial law and an independent judiciary cannot coexist. Bangladesh had a series of military

coups and counter *coups* between 15 August and 7 November of 1975. During this period there was total chaos and confusion; finally, after the *coup* of 7 November 1975 a somewhat more stable regime emerged. Although a civilian judge, Abu Sadat Mohammad Sayem, became the President, the real power holder was the Chief of the Army Staff, Major General Ziaur Rahman. It is customary that when a martial law regime is established in a country, a provision is made for the continuance of all existing laws and orders as long as they do not conflict with any of the martial law regulations or orders. A number of proclamations were made soon after the imposition of martial law by the proclamation of 28 August 1975, which is known as Proclamation of Order No. 1 of 1975. The Second Proclamation was issued on 6 November 1975. These two proclamations were made by Khandaker Mushtaq Ahmed, who became the first Chief Martial Law Administrator after the overthrow of the Mujib regime. The Third Proclamation of 8 November 1975 was made by the new Chief Martial Law Administrator and the President, Justice Sayem. Between 8 November 1975 and 28 May 1976 as many as eight Proclamations were issued. The Proclamation of 28 May 1976 which is also know as the 'Seventh Amendment Order 1976,' had some important provisions relating to the judiciary, as well as the power of the judiciary to enforce fundamental rights.

Under this amendment the Chief Martial Law Administrator, Justice Sayem, revived most of the provisions of the original 1972 Constitution relating to the judiciary, including its permanent tenure, status, powers, functions, etc. The judiciary was also given the power to enforce fundamental rights. But as the country was under martial law, martial law courts also continued to exercise judicial powers. It was only after the ending of martial law by the late President Ziaur Rahman in 1979, that the judicial system was on the whole revived in accordance with the provisions of the original version of the 1972 Constitution. The Tenth Amendment Order of 1977 issued on 27 November 1977, provided elaborate provisions relating to the judiciary under Chapter I, Articles 94 to 130.

Let us now discuss the role of the judiciary under Zia's new political order.

The judiciary under the Zia regime

When the late President Ziaur Rahman was engaged in reshaping or rather re-establishing, the democratic process in Bangladesh in 1977-8, he removed many of the undemocratic provisions of the Constitution resulting from the Fourth Amendment made by the late Mujibur Rahman in 1975. We have already discussed in the preceding pages the curtailment of the role, status, tenure, powers and function of the judiciary under Mujib's Fourth Amendment.

It was, therefore, obvious that when President Zia was in the process of ending martial law and restoring some sort of constitutional government, he had to turn his attention to the judiciary. In fact, in the Tenth Amendment Order of 27 November 1976 (Second Proclamation Order No. 1 of 1977), one of the orders dealt with the judiciary. He restored more or less Articles 94 to 113 of the original version of the 1972 Constitution. But we must hasten to add that Zia in his version of limited or controlled democracy had made certain changes affecting the judiciary. For instance, under Article 95 of the original 1972 Constitution it was provided that the President would appoint other judges of the Supreme Court 'after consultation with the Chief Justice.'

In Zia's version of the Constitution the significant words 'after consultation with the Chief Justice' which were dropped by the Fourth Amendment of the Constitution in January 1975, were not incorporated. That means that the president alone would appoint the Chief Justice and other judges. In a true democracy the president usually appoints the Chief Justice but other judges are appointed by the President either after consultation with the Chief Justice or, on the recommendations of the Chief Justice. Similarly, confirmation of a judge or additional judge was made an exclusive perogative of the President. Again in a democratic polity the confirmation is usually carried out if recommended by the Chief Justice. But recently, non-confirmation of an additional judge to the High Court Division of the Bangladesh Supreme Court by the President, in spite of the Chief Justice's recommendation, demonstrated the executive's interference with the judiciary.[12] To ensure the judiciary's independence, a parliamentary judicial

committee should be formed in order to investigate the reasons for the government's negative decision.

Similarly, with regard to the tenure of the judges of the Supreme Court, the 1972 Constitution provided that 'a judge shall not be removed from his office except by an order by the President passed pursuant to a resolution of parliament supported by a majority of not less than two-thirds of the members of the parliament on the grounds of proved misbehaviour or incapacity.' Zia, on the contrary, made the tenure of the judges dependent on a body called the 'Supreme Judicial Council,' which would consist of the Chief Justice of Bangladesh and the next two senior judges. The functions of the Judicial Council under Zia's political order would include: (a) prescribing of a code of conduct to be observed by the judges, and (b) enquiring into the capacity or conduct of a judge.

This Council was to make recommendations to the president about the misconduct of any judge and then the president alone could remove the judge. Again, we feel that this provision adversely affected the independence of the judiciary. If the judiciary has to be separated from the executive, and if it is to function independently, then the president or executive should not have any say in the matter of tenure of the judges. In a democratic state a judge holds office, as we have pointed out in our introductory page, 'During Good Behaviour.' Under Zia's political order the President, alone could appoint the Chief Justice and other judges, and was also given the power to remove a judge though with the help of a Judicial Council. This, we feel, was a departure from the principle of separation of the judiciary from the executive, and it might have affected the independence of the judiciary. As regards other provisions relating to the judiciary under the original 1972 Constitution, Zia retained in almost unchanged form, all these provisions.

The writs' jurisdiction of the court was also retained with the same qualifying clause 'as under article 47.' So we may conclude that the judiciary under Zia's political order was somewhat freed from the restricting clauses and provisions imposed under the Fourth Amendment of Mujibur Rahman in January 1975.

The judiciary under the Ershad regime

As pointed out in our discussions on the legislature and the executive, President Ershad, who overthrew a civilian regime and imposed the second martial law regime, had to make very little changes in the constitutional structure of the country. He inherited an all-powerful executive in a presidential system and a 'lame and tame' Parliament from his martial law predecessor, Ziaur Rahman.

Similarly, with regard to the judiciary he did not make any amendments or changes. Yet Ershad, through the Eighth Amendment introduced in January 1988, wanted to make some changes in the judicial system of the country. Under this amendment it was provided that while the Supreme Court would have its permanent seat in the capital city of Dhaka, the High Court Division would have permanent branches at Comilla, Chittagong, Barisal, Jessore, Rangpur and Sylhet. These branches at the various district headquarters would be composed of such a number of judges as the Chief Justice of Bangladesh would decide, with the Chief Justice confirming such powers and responsibilities on those branches. Further, the Chief Justice would regulate the rules and procedures of these branches.

This particular provision of the Eighth Amendment raised a hue and cry among the lawyers of the country, who challenged the amendment in the law court. The Supreme Court verdict was that such 'fundamental' changes in the structure of the judiciary could not be made by an 'ordinary' amendment. Therefore, it was declared invalid. Many have compared the decision of the Bangladesh Supreme Court with that of the Indian Supreme Court, which in its historic decision on the Kesavananda case in 1973, declared that no part of the Constitution could be amended by an act of Parliament so as to alter the 'basic structure and framework' of the Constitution. This analogy is, however, not fully correct. The Indian Supreme court, through the decision on the Kesavananda case, tried and successfully established its role as guardian and interpreter of the Constitution. It upheld the Twenty-fourth Amendment that the Parliament indeed had the right to amend the Constitution and partially acknowledged the Twenty-fifth Amendment on the same basis, but stressed

that any amendment of the Constitution must be subjected to judicial review.[13]

But the verdict of the Bangladesh Supreme Court on the Constitution (Eighth Amendment), 1988, regarding the structure of the court system, was more due to pressure created by the lawyers of the country than the Court's insistence on its role as the guardian and interpreter of the Constitution. This view is substantiated by the fact that the Constitution (Fourth Amendment), 1975, which changed the fundamental character of the Constitution in totality, was never challenged in the law court. The decision of the Supreme Court on the Eighth Amendment, however, challenged for the first time a politically motivated decision of the executive (as the 1972 Constitution had already provided that though the permanent seat of the High Court would be in Dhaka the judges of the High Courts were to sit in circuit in the major cities of Bangladesh) and was successful in checking such an arbitrary move.

The judiciary under the new parliamentary system

As a result of the Twelfth Amendment of the Constitution in September 1991 the country's executive system was changed from a presidential to a parliamentary one. We have discussed this fully in our chapters on the executive and the legislature. The Twelfth Amendment has not made any changes with regard to the judiciary. The judiciary remains the same as under Zia's political order which we have discussed above. While discussing the judiciary under Zia, we pointed out that he made significant changes in Article 95 regarding the appointment of judges. The original 1972 Constitution provided that the president would appoint the Chief Justice but other judges would be appointed by the president 'after consultation with the Chief Justice.' These significant words were dropped by Zia. A Bill has been introduced in parliament as a Private Member's Bill to restore these words: 'after consultation with the Chief Justice.' The Bill had not yet been passed at the time of writing this book. But it is a desirable change and should be approved by the Parliament.

Fundamental rights

In the first section of this chapter we have already shown that one of the fundamental functions of the judiciary in a modern democratic state is to protect and implement the basic rights of the citizens, which are provided usually in the constitution. In this connection, we have also referred to the writs jurisdiction of the judiciary, which is considered an effective weapon for ensuring the enjoyment of fundamental rights by the citizens.

To give a fuller and more comprehensive account of fundamental rights as provided in the Bangladesh Constitution itself, we shall begin our discussion with the concept and evolution of fundamental rights as they have developed in the modern democratic state.

The fundamental rights enunciated in Part III of the 1972 Constitution form an operative section of the charter. But before we discuss the rights enumerated in that section, let us give a brief resume of the origin of such rights.

The British Bill of Rights (1689), the Declaration of American Independence (1776), and the French Declaration of the Rights of Man (1789), have brought the idea of natural rights into the realm of constitutional reality. Most modern constitutions include a list of fundamental rights of the citizens which are regarded as free from governmental interference. These ideas are based on the concept of natural rights, which evolved from natural law and posit that human beings are born with certain inalienable rights. These rights, basically relate to man's very being and dignity, as existed 'prior to the state,' i.e., before the formation of the political community, and as such cannot be encroached upon by state authority. They are called 'subjective rights' and 'are not conferred by the state, but are possessed by the individuals against the state.'[14]

This seventeenth century concept of natural rights as, of 'life, liberty and property' as propounded by John Locke, and the theory of 'social contract,' not only kept these rights outside the purview of the government but introduced a new dimension which not only reinforced checks against royal absolutism, but successfully put restraints on governmental absolutism and also on governmental authority, both legislative and executive. The very idea that the state is not allowed to encroach on the 'inner

core of human dignity' makes the concept of natural rights synonymous with limited government, whose fundamental task is to provide safeguards to protect the personal sphere of the individual. The basis of all the basic institutions, civil and political, needed for a free society is provided by the doctrine of natural rights of individuals, enforceable through a constitutionally-enshrined mechanism. The Lockian concept of the right to life, liberty and property was transformed into civil liberties, which granted many other rights to the citizens. As such the concept of the rights of the citizens kept changing along with the changing socio-economic needs of society. In the twentieth century, the concept of human rights has gone through a more radical transformation. They are now synonymous with the freedoms enunciated in Rooseveltian proclamations, which are mostly economic and social in nature and need collective and governmental efforts to realize.[15] Every state perceives the need to guarantee these civil, political and social rights as vital for creating conducive conditions for the development of the potentialities of human beings, essential for a democratic polity.

So, paradoxically, with the growth of the state, it is the state which began to set limits or restrict some rights of individuals in the interest of the collective community. The concept of any role of political authority in regulating the fundamental rights was the contribution of English jurisprudent, Blackstone, who categorized these rights as absolute rights and relative rights. Thus, he wrote that, 'The principal aim of society is to protect individuals in the enjoyment of these absolute rights... the first and primary need of human laws is to maintain and regulate these absolute rights but civil liberty is not other than natural liberty so far restrained by human laws, and no further, as is necessary and expedient for the general advantage of the public.'[16] Thus the state is not only entrusted with the task of limiting these rights in order to serve the collective good, it is also by the same token asked to provide a mechanism to protect 'subjective' or 'absolute' rights. This ancient doctrine of natural rights is now manifested in the Declaration of Human Rights as ratified by the United Nations on 10 December 1948.

The adoption of these rights varies from country to country. According to K C Wheare, an ideal constitution should 'contain

few or no declaration of rights, though the ideal system of law would define and guarantee many rights.'[17] But such an assumption or conclusion may not be applicable to all countries in general. The Constitution of England is neither codified nor written, but the natural rights of Englishmen have been declared in the Magna Carta (1215), the Petition of Rights (1628), and the Bill of Rights (1689). English traditions, conventions, usage and the long history of the evolution of the English political institutions have moulded English awareness of individual rights which are as sacred and inviolable as the constitutionally written charters of many newly-emergent nations. As Professor Dicey puts it, in other countries 'individual rights are deductions drawn from the principles of the constitution, whilst in England the so-called principles of the constitution are inductions or generalizations based upon particular decisions pronounced by the Courts as to the rights of given individuals.'[18]

The Constitution of the United States pioneered the inclusion of the fundamental rights in an organic instrument. But initially there was no Bill of Rights in the original Constitution of 1787, though there were certain specific limitations on the government because it was assumed that the very nature of the constitutional government automatically guaranteed those 'inalienable rights.' Eventually the Bill of Rights was adopted at the time of ratification of the federal Constitution in 1789. Since then it is a common practice to include fundamental rights as an operative part of a constitution.[19] This practice is all the more imperative in a country where there is a lack of political maturity, strong public opinion and a long tradition of authoritarian rule. However, the inclusion of fundamental rights is by itself, not enough; specifying the mechanism through which remedies can be sought is also essential.

According to Professor K C Wheare, the inclusion of fundamental rights can be an immensely difficult task for the framers of a constitution. If they are not included, there is a possibility of the constitution not being accepted due to the alienation of certain sections of society. It is also difficult to define the nature and extent of these rights if significant and realistic goals are to be achieved. He goes on to say that 'the absolute rights of citizens are liable to create impediments for the working of an effective government.' Hence in most

constitutions declarations of rights are specified with certain qualification.[20]

The framers of the Constitution of Bangladesh were faced with a peculiar dilemma while including fundamental rights. All through the Pakistan period (the 1956 and 1962 Constitutions), the Awami League leaders, who were in the Opposition, were critical of the restrictions on fundamental rights enunciated in the Constitution, evidenced by Mujib's complaint in the Constituent Assembly of Pakistan 1956, that the draft constitution had made a mockery of fundamental rights by making them 'subject to any reasonable restrictions imposed by law in the interests of the security of the state.'[21]

But while Mujib and his associates were at the helm of the country they could perhaps see the practical difficulty in administering a country, and could not provide anything special in guaranteeing these rights of the citizens. Thus the fundamental rights enunciated in Part III of the Constitution are heavily borrowed from the Constitutions of Pakistan (1956 and 1962) and the Indian Constitution. And as expected, they are restricted with familiar qualifications.

In line with constitutions drafted since World War II, the rights granted were the usual liberties, such as: equality of status, opportunity and religion, equality before the law; protection of personal liberty and life; safeguards against unreasonable arrest or detention, trial or punishment; social, economic and political justice; and freedom of expression. Bangladesh being a homogeneous country was saved from making elaborate provisions for minority rights as enunciated in the Constitutions of India and Pakistan. Manobendra Larma of the Chittagong Hill Tracts expressed dissatisfaction at the lack of such provisions and said that the Constitution of Bangladesh did not reflect the hopes and aspirations of the tribal population of the Chittagong Hill Tracts. He proposed incorporating a clause in Article 47(A) that the Chittagong Hill Tracts should be autonomous so that the tribal population could establish its political, economic, social and religious rights.[22] His plea was rejected because it was assumed to be against the principles of the Bengali nation. Subsequently, however, Bangladesh was confronted with severe minority problems.

Article 27 unmistakably established the English idea of legal

equality or universal subjection of all classes to one law administered by the ordinary courts, as well as equal treatment under the law in all spheres of public life. The legal aspect of this doctrine is fundamental in any country which is governed by the rule of law. It is manifested in Article 29, which guaranteed equal opportunity in public employment. Article 28 stipulated no discrimination 'against any citizen on the grounds only of religion, race, caste, sex or place of birth,' which indicated the state's endeavour to grant social justice, which was further illustrated in sub-clause 3 declaring non-discrimination as regards to access to public places. In line with the same objective, sub-clauses 28(4) and 29(3) allows the state to make special privileges in favour of women and children and make special provisions for backward sections of the society in order to make the ideal of social justice truly meaningful. Article 34 abolished all forms of forced labour.

The right to personal liberty is synonymous with the inalienable natural right to life, liberty and property. As pointed out earlier, the concept of personal liberty was transformed along with the changing needs of society, and consequently the right to property was restricted in favour of collective benefits. This has been evidenced in the Bangladesh Constitution wherein Article 42(1) made the right to property subject to qualifications such as sub-clause(2) which stipulated the right to property save in accordance with law 'for the acquisition, nationalization or requisition with or without compensation,' whereas India and Pakistan provide for laws of compensation in case of acquisition or requisition. This provision can be considered a fundamental step towards the implementation of the directive principle of state policy. It could be expected from the leadership of Bangladesh, as evidenced in the debates of the second Constituent Assembly in which 'while the big landlords from West Pakistan defended landlordism, the members from East Pakistan sought to bring amendments providing for the abolition of feudalism and landlordism even without compensation.'[23]

The inner core of fundamental rights, a person's right to life and liberty, is enshrined in Article 32, qualified by the phrase 'in accordance with.' This right indicates the absence of arbitrary powers of the executive and the promise for the individual

right to liberty thus stipulates 'that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.'[24] Thus, for the protection of individual liberty a citizen would have the right to the protection of law and cannot be kept in custody without legal grounds for arrest, cannot be denied the right to consult or to be defended by legal counsel, must be produced before a court within twenty-four hours of arrest, and cannot be detained further without the order of a court.

Article 311, 33(1),(2) are all in accordance with the law. Similar provisions are found in the Indian Constitution (Articles 15-22) as well as in the Irish Constitution of 1937 (Articles 40-44).

The fundamental task of a democratic government is to bring about social equilibrium between various interest groups through negotiation and compromise. Only a mature public opinion achieved through participation and discussion is capable of bringing about such an equilibrium. Without freedom of expression, i.e., freedom of assembly, association, speech, and press there cannot be mature public opinion, which is a concomitant for any constitutional government.

The Constitution of Bangladesh included such provisions, i.e., freedom of movement assembly, association, thought, conscience and speech, profession, religion and protection of home and correspondence. They are, however, restricted by the interests of: (a) public interest; (b) public order or health; (c) public order and morality; (d) security of the state and friendly relations with foreign states; (3) decency; (f) religion; (g) defamation; and (h) incitement to an offence. Granting these political rights of the citizens in contradictory terms is a practice of modern constitutions. It is argued that granting these rights in absolute form in countries where public opinion is not articulated can pose serious problems. In a country like England where 'general principles' of the constitution regarding individual rights are due to the decisions of the judicial courts, imposition of such restrictions are not required. But it cannot be denied that there can be enormous difficulty in maintaining such rights without restrictions.

The mere insertion of a declaration of fundamental rights, however, does not guarantee the rights of the citizens unless

a constitutionally enshrined mechanism is provided to make these rights effective. For the enforcement of these rights Articles (1) and (2) gave power to the Supreme and High Courts within their respective jurisdictions to issue certain writs, such as *habeas corpus, mandamus, prohibition, quo warranto* and *certiorari* to enforce these rights enunciated in the Constitution. A lone opposition member alleged that the Constitution had not sufficiently empowered the courts to enforce the provisions for fundamental rights, as 'rights were given to the people by one hand and snatched away from the people by ten hands.'[25] Law Minister Kamal Hossain while defending the draft constitution bill which was ultimately adopted, said that by demanding such provisions the Opposition was 'undermining the supremacy of the Parliament and hence that of the people.'[26]

In essence, what was implied was that when all these rights are in accordance with the law their effectiveness is dependent upon the law of the land. As Professor K C Wheare, after pointing out the examples of a number of democratic constitutions, said, 'It may be asserted that these and similar declarations in other constitutions of rights which may not be restricted except in accordance with the law, are in practice effective because the law confers no arbitrary powers upon the executive,' whereas the Constitution of the Soviet Union (1936) and Yugoslavia, (1946), which guaranteed unqualified rights, were not effective because 'the law in the Soviet Union or in Yugoslavia is not as restrictive of the powers of the executive.'[27]

The Opposition's allegation is, however, applicable with regards to Article 47(1) and (2), which is inconsistent with the concept of Article 26. Sub-Clause (1) of Article 47 stipulated that existing or amended laws regarding this part of the Constitution would not be regarded as void even if they were inconsistent with the provisions of Article 26 or took away or abridged any of the rights guaranteed by that part of the Constitution. Similar provisions are found in Article 31(C) of the Indian Constitution. The framers were of the opinion that the abridgement of certain fundamental rights was necessary in order to give effect to the fundamental principles of state policy contained in Part III of the Constitution.

More provisions which took away or abridged some basic fundamental rights are contained in Article 47(2), which

stipulated saving certain laws, specified in the First Schedule made during the interim period and before the passing of the Constitution. It made provisions not only for saving certain laws, but provided for saving of amendments of such laws with retrospective effect. Suranjit Sen Gupta pointed out that the Presidential Orders specified in the First Schedule which have been incorporated in the Constitution were the proclamations of the Mujibnagar government. They could be accepted, he continued, if they were passed in Parliament. He further added that there is no such instance in this regard. Saving of certain laws made during the interim period and before the commencement of the Constitution is not, however, uncommon, as enunciated in Article 32(B) of the Indian Constitution specified in the Ninth Schedule. But the nature and character of those laws are different, as they are mostly directed towards social justice. Whereas certain laws specified in the First Schedule of the Bangladesh Constitution of 1972 certainly took away or abridged some basic fundamental rights, Mr Sen Gupta proposed that Orders No. 9,16,50 and 67 should be discarded as they abridged the rights of government officials. The right of property, which is usually settled through law courts, thereby giving the government leeway to patronize party workers, gave power to the government to harass and imprison political workers; and provided a new weapon against civil servants, as they could be dismissed through screening. He compared these laws with the Orders retained in the Pakistan Constitution which were later used to exploit people.[28] There is no doubt that retaining laws specified in the First Schedule took away or abridged some basic fundamental rights. It should, however, be pointed out that the Constitution did not include any emergency provision like that of Pakistan under Article 191 or Article 352 of the Indian Constitution, under which fundamental rights could be suspended.

We have already stated the rationale and background of incorporating a lengthy list of fundamental rights in the Bangladesh Constitution (Part III of the Constitution). After the bitter experiences of living under 'controlled democracy,' 'martial law regimes' and 'constitutional dictatorship', the people of Bangladesh after independence were naturally anxious to establish a 'free life in a free society' and in order to achieve

this goal, incorporation of fundamental rights in the Constitution was regarded as essential. The framers of the 1972 Constitution seemed to prefer fundamental rights without any safeguards in the form of preventive detention, or security act and suspension of fundamental rights during a period of emergency. So we find that in the original Constitution of 1972 there was, for instance, no provision for declaring a state of emergency under which fundamental rights would remain suspended and so also the power of the judiciary to enforce fundamental rights.

The framers of the 1972 Constitution must have been exuberant that they could really fulfill their promise and be able to enact a Constitution without any 'black laws.' Most of the top-ranking Awami League leaders were victims of such undemocratic laws during the Pakistan period. How the then West Pakistani ruling clique used those 'black laws' to thwart the legitimate demands of the Bengalis and retarded the democratic process of the country was still vivid in their memories.[29] So we find that one of the significant characteristics of the 1972 Constitution was the absence of any provision for preventive detention in Article 33. Preventive detention is usually considered inconsistent with the spirit of fundamental rights. Under preventive detention a person can be arrested even before he commits any breach of law. A person may be held under preventive detention to 'prevent' him from committing any act even before he commits it. This is against the spirit of fundamental rights. Both in India and Pakistan there are provisions for preventive detention.

The first setback on fundamental rights

The framers of the 1972 Constitution of Bangladesh were noted for their enthusiasm for building a really 'free society.' There was, therefore, no preventive detention or security act. Similarly, provision for emergency situations was also regarded as inconsistent with the spirit of a free society. So both preventive detention and emergency powers were abolished in the original text of the 1972 Constitution. As Law Minister, Kamal Hossain pointed out that only a few countries' constitutions are without such undemocratic principles and Bangladesh was one of them.

Unlike the rulers of the then Pakistan, the Awami League seemed determined to create an environment conducive to a free and democratic society.[30] But unfortunately, their exuberance was short-lived and this situation did not last long. Within a year and a half, emergency provisions were added to the Constitution. Soon the Security Act, the Special Power Act and several other restrictive measures were also adopted. The net result of all these new changes and additions, such as the emergency powers, the special power act, and preventive detention, was that the original idealistic concept of a free society as a legacy of the Pakistan period was diluted. By 1974, the Constitution was a close copy of the Pakistani Constitution of 1956, rather than an unqualified document for a free society.

Why did these changes take place? The critics of the Awami League Government alleged that the regime took steps to revert to 'colonial instruments', for maintaining and consolidating their powers. The fast deteriorating law and order situation, as well as desperate economic conditions, made the Awami League Government afraid of facing any serious challenges to its undisputed authority, which was the case in 1971-2. Moreover, the Constitution may have been ideal but the existing situation immediately following the liberation war was far from conducive to the working of such a liberal Constitution. First, the impact of the liberation war was far reaching. There were multifarious ramifications of a bloody and brutal war.[31] Second, the traditions, conventions, and political culture needed for the effective working of a highly-sophisticated form of government like a parliamentary system were totally lacking in the newly independent Bangladesh, since a democratic system was never allowed to take roots in the soil of the then East Pakistan. Lastly, the dominance of the Awami League (which captured 297 out of 300 parliamentary seats in the 1970 election, and 282 out of 289 seats contested, while the Opposition including independents secured only 7, in the 1973 election), and its charismatic leader Sheikh Mujibur Rahman, largely contributed to the degeneration of a real parliamentary system into a brute majority rule.

The country, since the promulgation of the Constitution until the Fourth Amendment which turned it into a one-party dictatorship, had a facade of parliamentary government, but in reality powers were concentrated in the hands of the chief

executive, on whom Parliament had no control, nor did it want to exercise such control.

The situation was rather paradoxical. The ruling party had undisputed dominance in the Assembly but was unable to control the fast deteriorating law and order situation as well as the desperate economic conditions. The government was also afraid to face any serious challenges to its undisputed authority as pointed out earlier, which was the case in 1971-2. Under such circumstances within nine months of the commencement of the Constitution, the second Amendment Bill was passed in September 1973, which amended Article 33, added a new clause to Article 31, and a new part numbered IXA providing for emergency powers to be exercised by the President of the Republic. Article 33 was amended to include preventive detention, which allowed a person to be held in detention for no more than six months without the recommendation of an advisory board.

The new chapter, Part XIA, added three more Articles: 141 A, 141B, 141C. In line with Article 352 of the Indian Constitution and the Pakistani Constitutions of 1956 and 1962, these articles gave powers to the president, if satisfied, to declare an emergency for no more than six months, unless extended by Parliament. In order to further prevent the misuse of emergency powers by the president, as it was done by Ghulam Mohammed in the early 1950s during the Pakistani period, a proviso to Article 141C, which was subsequently omitted by Act II, 1975, maintained that the Procalmation 'shall require for its validity the counter-signature of the Prime Minister.' The power to declare emergency, thus, effectively lay with the prime minister. No such proviso is found either in the emergency provisions of the Constitution of India or the 1956 Constitution of Pakistan. However, the 1956 Constitution of Pakistan and the Indian Constitution (1949), both, provided clauses which made the Proclamation subject to the approval of the Parliament, whereas the National Assembly of the 1962 Constitution had no such power to limit the time period of such a proclamation. As such, it was an improvement to check the emergency powers of the president, had the situation called for their use. Article 141B suspended Articles 36,37,38,39,40 and 42 during the emergency and in addition provided that though the laws made during

these periods would 'cease to have effect as soon as the Proclamation ceases to operate, the acts of commission and omission will remain effective.' Article 141C suspended the rights of any court to enforce the rights conferred by Chapter III, i.e., fundamental rights, and any such cases pending before the court would also be suspended while an emergency was in effect.

Thus, the Awami League, champion of unfettered democracy and self-proclaimed crusader against 'black laws,' ironically found itself supporting the very same 'undemocratic laws' in their cherished and ideal Constitution. The lone opposition voice was that of Ataur Rahman Khan, who said that since Article 63(3) already provided the president the powers to act in any way to deal with 'armed rebellion,' meaning internal disturbances, there was no need for a new part providing emergency powers to the President. According to Khan 'it was being introduced so that fundamental rights could be suspended, and he was against any such security act.'[32] However, Law Minister Monoranjan Dhar maintained that all democratic countries have emergency provisions in their constitution to deal with emergency situations. It was one of the rules of any constitution, he added. He was then more specific and said that the situation in Bangladesh was such that a declaration of emergency and temporary suspension of fundamental rights, if needed, were not incompatible with the national interests of Bangladesh.[33]

What Monorajan Dhar forgot to mention was that though there are such provisions in the constitutions of advanced democracies such as Britain or France, those provisions are accompanied with qualifying conditions. The President of France, for example, under Article 8, is entitled to declare an emergency, as was done by President De Gaulle in 1962 during an agriculture crisis. But the Assembly, which was in recess, immediately reconvened to monitor the activities of the executive as well as to assess the situation. Thus the assemblies of those countries serve as watch-dogs over the executives and keep the electorates informed. There were no such provisions in the newly added Part XIA of the Constitution. It should, however, be noted that in theory, emergency provisions, security or preventive detention acts are

undesirable and cannot be supported in any scheme for a truly free society.

But it has to be admitted that the new Third World democracies of the Afro-Asian countries face many challenges and dilemmas which is not usually the case in well-established democratic countries like England or the United States. While we cannot support any idea of curtailment of individual freedoms or powers of the judiciary in protecting the citizens' basic rights it cannot be denied that some 'safety clauses' are needed in the turbulent and emerging democratic states of Asia and Africa. In these new countries the fundamental rules of democracy are not yet fully established. The ruling regimes consider any opposition to the government as opposition to the state itself, while the Opposition seems to fail to appreciate that opposition to the government is not the same as opposition to the state itself. They fail to make the proper distinction between opposition to the government and opposition to the state.

Unlike the developed democracies 'the political culture of our people and leaders is not mature and the political elites do not practice self-denying ordinances.'[34] As long as the basic rules of the game of democracy are not fully developed, some safety belts in the shape of provisions of emergency or preventive detention may be unavoidable, however, regrettable they may be. But it is an undeniable fact that all these security acts were incompatible with the spirit of a free, democratic society. Whether democracy is possible in a country like Bangladesh is one question; incompatibility of the acts is another. The fact of the matter is that fundamental rights granted in the Constitution were effectively retarded by such acts. The situation in Bangladesh, however, has remained unchanged.

In spite of the provisions for preventive detention and emergency powers, the law and order as well as economic conditions continued to deteriorate. According to former state minister Taheruddin Takur, the number of dacoities, robberies committed from January 1973 through November 1973, was about 5000, whereas the number of illegal arms and ammunition recovered stood between 3000 and 4000.[35] Faced with increasing challenges the ruling party, with the help of a one-party dominated Parliament, got a number of bills passed which were

more stringent and detrimental to a democratic society. The Printing Presses and Publications (Declaration and Registration) Act of 1973; the Jatiya Rakhi Bahini (Amendment) Bill of 1974 and the Special Powers (Amendment) Bill of 1974 are the most outstanding ones in this respect.

Following the liberation war, the President's Order No 21 of 1972 mandated the *Jatiyo Rakhi Bahini* was to assist the civil as well as the military forces in the maintenance of the internal security of the country. Section 8, of this order stipulated that 'The *Bahini* shall be employed for the purpose of assisting the civil authority in the maintenance of internal security when required by such authority as may be prescribed; (2) The *Bahini* shall render assistance to the Armed Forces when called on by the Government to do so in such circumstances and in such manner as may be prescribed; (3) The *Bahini* shall perform such other functions as the Government may direct.'

The origin and nature of such a force is shrouded in controversy. Whereas the Government claimed that it was created to maintain internal security, the general belief was that it was constituted at the behest of India with its main task being the elimination of all anti-government elements under the cover of a law-enforcing agency. The initial operation of the *Bahini* was without any prescribed authority and its subsequent activities enhanced people's suspicion and distrust. It was assumed that the *Bahini* was somewhat like a private militia which acted to terrorize and intimidate opponents of the regime. By 1974, the nature, origin and role of the *Bahini* had become a subject of bitter criticism in the press and media.[36] It became a symbol of a repressive regime.

On 28 January 1975 a Bill entitled 'The Jatiyo Rakhi Bahini (Amendment) Bill, 1974' was brought up in Parliament to be amended and to add a new article. The amended section 8A (1), (2), (3) and the addition of Article 16A gave sweeping powers to the *Rakhi Bahini* to 'arrest without warrant, search any person, places, vehicle or vessel, and seize anything found in the possession of such or in such place in respect of which or by means of which he has reason to believe an offence punishable under any law has been committed.'[37]

There is no doubt that the Awami League Government vested unfettered authority on the *Rakhi Bahini*, which could easily be

misused by the *Bahini*, especially as it could arrest anybody if it had 'reason to believe' that the individual had committed a crime. This meant that a 'crime' could be speculative but the punishment could be administered on that speculation. The addition of Article 16A thus made the *Bahini's* position even more invincible, since the article stipulated that 'a suit, prosecution or other legal proceeding shall not lie against any member of the *Bahini* for anything which is in good faith done or intended to be done in pursuance of this order or any rule made thereunder.'[38] In effect this meant a further erosion of the fundamental rights and personal liberty of the citizen.

Within a week of the passing of the Jatiyo Rakhi Bahini (Amendment) Bill, the Special Powers Bill, 1974, was passed without much resistance. The Bill was brought up in Parliament for the same old law-and-order problem and sought to 'provide for preventive detention and speedy trail for effecting punishment of certain offences of a grave nature, such as offences against the state, robbery, dacoity, sabotage, hoarding and black-marketing, illegal possession of arms and explosive substances and offences committed being armed with firearms and explosive substances.'[39] In order to check the so-called law-and-order situation, clauses one through fourteen stipulated detention without trial, detention without warrant for a maximum period of one hundred and twenty days, which could be extended if recommended by an Advisory Board provided by the Act. A person under detention, however, must be charge-sheeted within fifteen days of his arrest. Though a person could not be detained for more than one hundred and twenty days, in practice the government could easily rearrest the individual and keep him under detention for another 120 days, and so on.

As pointed out earlier, Parliament in 1973 was dominated by the Awami League and the strong opposition needed to make a 'living democracy' was missing. A handful of Opposition MPs led by Ataur Rahman Khan raised feeble voices against the passing of such an act. They refuted Law Minister Monoranjan Dhar's arguments, who by citing the number and nature of the crimes committed between 1973-4, tried to convince the House that it was needed to bring the runaway law-and-order problem under control. But the Opposition was

not convinced. They thought that the country's penal code was enough to tackle the internal situation of the country. It was assumed that the Act was being enacted so that pro-Awami League smugglers could be protected. The fact that the government urged army officials, who were ordered to collect unauthorized arms and stop smuggling, not to disturb the pro-Awami League groups raised legitimate questions about the regime's real intentions.[40] As such it was assumed that the act was politically motivated and 'it would be used against the workers of the opposition parties and would be misused by the government.'[41] According to Syed Kamal Islam Mohammed Shaleuddin, with such an operative act in the country, there would be 'no scope for rule of law and constitutional politics.'[42]

Furthermore, clauses 10, 11, 14, 15, 16, and 17 contained provisions curtailing the freedom of the press, as the government, if satisfied, could forfeit alleged prejudicial documents and conceal or stop the publication of newspapers for printing prejudicial reports, whether before or after the commencement of the Bill. The government also had the power to censor newspapers by threatening to take over their deposits of security money, (Takka 25,000). Under the circumstances the freedom of the press, one of the fundamentals of any democratic government, was severely restricted, especially when the meaning and definition of words like 'if the Government is satisfied' or 'prejudicial' remained vague and subjective.

Another clause which aroused suspicion among the people was Clause 18, which stipulated that 'where the security of Bangladesh, friendly relations of Bangladesh with foreign states, or public order require that it is necessary so to do, the government may by order addressed to a Printer, Publisher or Editor or Printers, Publishers or Editors generally affecting the security of Bangladesh, friendly relations of Bangladesh with foreign states, or public order, so on and so forth.'[43] A number of factors were, however, responsible for the resentment and suspicion created by Clause 18 of the Special Powers Act of 1974.

The root cause of this psychology was interlinked with Indo-Bangladesh relations. By 1974, bilateral relations between the two countries had been institutionalized through a number

of treaties. Among the most notable were: a 20-year treaty of friendship and co-operation, a one-year trade agreement, and an interim agreement on the sharing of the Ganges water. But in spite of such institutionalization, relations between the two countries, as pointed out earlier, had already started showing signs of stress and strain, not at the super-structure level but at the grassroot level as well. The reason was a general belief, right or wrong, that the Mujib regime was too subservient to India. Especially, there was widespread resentment against the 20-year friendship and co-operation treaty. On the other hand, trade between Bangladesh and India was a disastrous failure. Structural imbalances and the lack of complementarity gave rise to widespread smuggling across the border. Raw jute, for example, Bangladesh's main export item, found its way to Calcutta markets through smuggling instead of state-to-state transactions. The result was scarcity and high prices of essentials.[44] India's unwillingness to share the Ganges water in the context of an interim agreement only added fuel to the existing anti-Indian mood in the country. All these were considered part of India's evil design to make Bangladesh a 'colony' of India.

Against the backdrop of this scenario, Clause 18 prohibiting any references prejudicial to a friendly country (meaning India in this case) became all the more controversial. Questions were asked about the necessity of such laws which persecuted and could imprison for the sake of national interest newspaper publishers for five years if they criticized 'the friendly country.' As Abdullah Sarkar said, 'It was a clear message to the journalists that they would be spared if they continue supporting the Government. But rubbing the Government in the wrong way, even if the news were correct, could land them into trouble, thanks to the Special Powers Act of the Government.'[45] The Bill, however, was passed in Parliament without any difficulties.

The most severe and crushing blow to fundamental rights came from the passage of the Constitution (Fourth Amendment) Act, 1975. Sheikh Mujibur Rahman, after declaring an Emergency in December 1974, and having lengthy discussions, with the Party, decided to bring fundamental changes in the Constitutional Order of the country in order to bring 'economic freedom to the masses in an exploition-free society and to

establish socialism and democracy of the exploited.' Along with other changes needed to establish a one-party authoritarian state, which were discussed in the chapters on the executive, legislature and judiciary, the Amendment included provisions which scrapped fundamental rights in one stroke.

The Amendment replaced Article 44 of the 1972 Constitution which authorized the Supreme Court to enforce fundamental rights under Article 102(1). The courts, under the article, were empowered to issue writs, *habeas corpus* and give order and directions to the authority whose actions were thought to be an abridgement of a citizen's fundamental rights. Under sub clause (4) of the same Article, the High Courts were given power to issue interim orders relating to the implementation of any socialist programme, or development work seen as otherwise harmful to public interest after 'the Attorney General has been given reasonable notice of application and he has been given an opportunity of being heard.'

The new Article 44 stipulated that Parliament may by law establish a constitutional court, tribunal or commission for the enforcement of fundamental rights. It, thus, effectively took away the powers of the courts to enforce such rights, which had been a part of the traditional legal system inherited from the British.

The addition of Part VIA and incorporation of Article 147A provided provisions for the creation of a National Party, which abridged one of the basic fundamental rights needed for the flowering and flourishing of a democratic polity, namely freedom of association and freedom to form a political party. Democracy means pluralism. It accepts the fact that a society is made up of conflicting interest groups.

In a democracy, associations representing various interest groups are freely formed which often evolve into political parties. The parties, in turn, play a vital role by giving leadership to these associations and bringing social equilibrium by reducing conflicting interests and cleavages through compromise and negotiations.

But Article 117 A(1) of the Fourth Amendment entrusted the task of forming a National Party, to the President of the Republic in order to give full effect 'to any of the fundamental principles of State Policy.' Sub-clauses (2), (3) and (4) stipulated

that the president by order could take necessary steps to form the National Party coinciding with the dissolution of all other political parties. The nomenclature, programme, membership, organization, discipline, finance and function of the National Party were to be decided by the President by order. Sub-clause (4), for the first time in the history of the subcontinent, allowed civil servants to become members of a political party, namely the National Party.

Each member of Parliament was required to become a member of the National Party, once it was formed, within the time fixed by the President. Otherwise his seat would become vacant. Nobody was allowed to contest elections, either parliamentary or presidential, unless the candidate was nominated by the National Party. Nobody was to form or become a member or take part in the activities of any other political party other than the National Party.

In June 1975, Sheikh Mujibur Rahman, after forming the National Party, promulgated the Newspaper (Annulment of Declaration) Ordinance which banned the publication of all newspapers excepting four national dailies, which were to be owned and managed by the government. The initial endeavour of the regime, namely the Printing Presses and Publication (Declaration and Registration) Act, 1973, to bring the media under its control thus culminated in the above mentioned Ordinance. The Fourth Amendment, thus, paved the way for a monolithic political structure wherein no political dissent or opposition was to be tolerated.

Revival of fundamental rights (1976 to date)

Subsequently, President Sayem, as Chief Martial Law Administrator, introduced a multi-party system through the Political Parties Regulations of 1976 (NCR No. XXII of 1976), and abolished the one-party system. The political parties now required the approval of the government before they could be registered. The regulation, thus, accepted the existence of parties but they were to be 'under the absolute control and supervision of the martial law government.'[46] Subsequently, this act was repealed.

The late President Ziaur Rahman also made a few constitutional amendments, but all the security acts, including the Special Powers' Act, were kept intact and they are still in force. During the democracy movement of December 1990, all major political parties demanded the withdrawal of these black laws. But once in power Begum Khaleda Zia, leader of the Bangladesh Nationalist Party, declared that they would be repealed in due time.[47] The Constitution (Twelfth Amendment) Bill, 1991, introduced by major political parties is silent on this issue. The Bangladesh Nationalist Party only added a new proviso in Article 141A, clause (1) in the Amendment Bill that 'such Proclamation (i.e., emergency) shall require for its validity the prior counter-signature of the Prime Minister,'[48] so that it is exercised by the peoples' representatives.

The leader of the Workers' Party, however, introduced an amendment to Article 33 and suggested the abolition of sub-clause (3) of Article 26 in order to guarantee fundamental rights. This proposed amendment has not been incorporated in the amended Constitution under the Twelfth Amendment, 1991. The general consensus seems to be that these laws are needed, as pointed out earlier, in a new democracy like Bangladesh. But they should be used by the people's representatives. In order to do so, more qualified measures are needed, such as assigning to Parliament, during an emergency, the role of a watch-dog. No such role for Parliament has been visualized in the future constitutional order of the country. The abridgment of fundamental rights, however, will continue as long as the Special Powers Act and other preventive acts are in operation. In order to make those rights effective, the Special Powers Act should be repealed and complete separation of the judiciary from the executive should be carried out without further delay by adopting the Judiciary Bill of 1991.

NOTES

1. Gledhill, Alan, *The British Commonwealth: The Development of its Laws and Constitution;* vol. 8 (Pakistan), (London: Stevens & Son Ltd., 1957).
2. Garner, S J W, *Political Science & Government*, (Calcutta: The World Press Private Ltd., 1958), p.684.

3. Strong, C F, *Modern Political Constitutions*, 8th edition, (London: Sidgwick & Jackson Ltd., 1966), p.277.
4. Abraham, Henry J, *The Judicial Process*, 5th edition, (New York: Oxford University Press, 1986), p. 292.
5. Wolfe, Christopher, *The Rise of Modern Judicial Review*, (New York: Basic Books Inc., Publishers, 1986), pp. 3-4.
6. Ibid, p. 5.
7. MacIver, R M, *The Web of Government*, (New York, 1949), p.204.
8. Gledhill, Alan, op.cit.
9. Article 96 (2) & (3).
10. Austin, Granville, *The Indian Constitution: Cornerstone of a Nation*, (Oxford Clarendon Press, 1966).
11. Ahmed, Moudud, *The Era of Sheikh Mujib*, (Dhaka: The University Press Ltd., 1983), p. 238.
12. *The Bangladesh Observer*, 10 March 1992.
13. Morris-Jones, W H, *'The politics of the Indian Constitution'*, in Bogdanor, Vernon, et al., *Constitutions in Democratic Politics*, (Aldershot, England: Gower Publishing Ltd., 1988).
14. Friedrich, C J, and MaCloskey, (ed.), op.cit.
15. Friedrich, C J, op.cit.
16. Basu, Durga Das, *Limited Government and Judicial Review*, (Calcutta: S.C. Sarkar & Sons Pvt. Ltd., 1972).
17. Wheare, K C, *Modern Constitutions*, (London: Oxford University Press, 1951), p. 76.
18. Dicey, A.V, *Introduction to the Study of the Law of the Constitution*, (London: Macmillan, 1915), p.117.
19. Basu, Durga Das, op.cit. p.158.
20. Wheare, K C, op.cit, pp.55-6.
21. Quoted by Suranjit Sen Gupta in the Constituent Assembly Debates, Vol. 2, No. 13, 1972.
22. Mr Manobendra Larma's speech, Constituent Assembly Debates, Vol. 2, No. 13, 1972, p. 536.
23. Choudhury, G W, *Constitutional Development in Pakistan*, (London: Longmans Green, 1959), p. 236.
24. Dicey, A V, op.cit., p.110.
25. *The Bangladesh Observer*, 25 December 1972.
26. *The People*, 31 October 1972.
27. Wheare, K C, *Modern Constitutions*, op.cit., p.60.
28. Constituent Assembly Debates, Vol. 2, No. 15, 1972, pp. 648-651.
29. For details, see, Choudhury, G W, *Democracy in Pakistan*, (Vancouver: University of British Columbia, 1959), and Khalid B. Sayeed, *The Political System in Pakistan*, (Boston: Houghton Miffin Company, 1967).
30. *The Azad*, November, 1972.
31. Talukdar, Maniruzzaman, *Bangladesh Revolution and its Aftermath*, (Dhaka: The University Ltd., 1988).
32. Jatiyo Sangsad Debates, Vol. 3, No. 5, 20 September 1973, p. 174.
33. Ibid, p.177.
34. Holmes, Stephen, *Gag Rule or the Politics of Omission*, in Elster, Jon and Rune

Slagstad, Rune, (ed)., *Constitutionalism and Democracy*, (New York: Cambridge University Press, 1988).
35. Jatiyo Sangsad Debates, Vol. III No. 2, January 1974, p. 528.
36. For details see Ahmed Moudud, *Bangladesh: Era of Sheikh Mujib*, 3rd (ed.), (Dhaka: The University Press Ltd., 1984).
37. The Bangladesh Gazette, 1974.
38. Ibid.
39. Ibid.
40. Talukdar, Maniruzzaman, *Bangladesh Revolution and Its Aftermath*, op.cit.
41. Jatiyo Sangsad Debates, Vol. 1, No. 16, 4 February 1974, p. 288.
42. Ibid.
43. The Bangladesh Gazette, 1974.
44. Choudhury, Dilara, *Bangladesh and South Asian International System*, (London: Scorpion Publishers, 1992).
45. Jatiyo Sangsad Debates, Vol. 1, No. 16, 4 February 1974, p. 900.
46. Aleem-Al-Razee, *Constitutional Glimpses of Martial Law in India, Pakistan and Bangladesh*, (Dhaka: The University Press Limited, 1988), p. 75.
47. *The Bangladesh Observer*, 15 May 1991.
48. *The Constitution (Twelfth Amendment) Bill*, 1991.

Democracy in Bangladesh

Constitutionalism in Bangladesh, since its inception in 1972, has been subjected to severe stresses and strains. Theoretically, the country still possesses the original 1972 constitutional framework, but in reality its history is marked by numerous breakdowns, suspensions, and amendments. Changes have been made to such an extent that it would not be incorrect to say that Bangladesh has had at least three different constitutions since liberation, those of 1972, 1975 and 1979. The Constitution brought about through the Twelfth Amendment provides a parliamentary form of government like that of the original Constitution, but it is also vastly different from the one adopted in 1972. In the preceding chapters of the book attempts have been made to analyse the functioning of constitutionalism in Bangladesh by describing and analysing the three principal organs of the state: (a) the executive, (b) the legislature, and the (c) judiciary.

We have discussed constitutionalism in Bangladesh both historically and analytically. While discussing the legislature, for instance, we discussed, the legislature under Mujib, then under Zia and Ershad, and finally in the present era. We have also referred to the interruptions and breakdowns of the democratic process during the several periods when the legislature was either totally suspended, or the powers of the legislature were curtailed.

Similarly, we have discussed the evolution of the executive system in Bangladesh under all the four regimes as well as during the martial law periods. With regard to the judiciary, we have stressed the fact that without an independent judiciary, there cannot be any form of democratic government nor can citizens enjoy fundamental rights.

It is one thing to describe the structure and functions of the three vital organs of the state in theory, but, however,

indepth or enlightened the analysis may be, it does not give the whole picture of the political dynamics of the country. There may be an impressive list of the fundamental rights incorporated in the constitution, with the judiciary having the power to implement those rights, but in practice these fundamental rights may be negated by other laws of the country which may severely curtail their meaning, and subsequently the fundamental and basic rights of the citizens. If a country also has a preventive detention act, special security act, political party act, etc., then it may be a case of giving rights with one hand and taking them away with the other.

Similarly, a legislature may have an effective role to play under the Constitution, but a legislature cannot play its role unless certain conditions are fulfilled, for example, the legislature must be elected by free and fair elections contested by more than one party or parties through adult franchise. History has not yet furnished an example of a successful legislature without free and fair elections. There are legislatures in dictatorial and quasi-dictatorial systems. Even in Nazi Germany under Hitler there was a legislature. In many developing countries authoritarian or quasi-constitutional regimes also have legislatures, but they are mere 'rubber stamps,' i.e., not the type of legislatures which one expects in a true democratic country.

Similarly, the executive may be a parliamentary or presidential one, or any other form freely chosen by the people. The executive may be very powerful. A British prime minister backed by a majority in Parliament sometimes exercises greater power than many dictators. But the difference between a British prime minister and a dictator is that the former's powers are restrained by well-established and time-honoured conventions. The British prime minister operates in a well-defined system of restraints and rules, whether written or unwritten. But in a dictatorial system, the ruler exercises power, even though it may not be unlimited, without any constitutional restraints or conventions. So a glance at a country's constitution cannot confirm whether that country really enjoys constitutionalism or democracy.

A constitutional state thus may be, threatened due to various factors discussed in the introductory chapter, in spite of elaborate

constitutional prescriptions directed against the arbitrary actions of the executive, an independent judiciary, and an impressive catalogue of fundamental rights. The onslaught of dictatorial regimes, either military or fascist, in post-First World War European countries, such as Germany or Italy, could not be checked even though these countries had ideal constitutional arrangements.[1]

Constitutional development in Bangladesh furnishes an example of how the establishment of a constitutional government has been thwarted repeatedly in spite of ideal constitutional prescriptions in the original 1972 Constitution. We have discussed the rise of not only a 'strong executive' but an arbitrary one at the cost of a sovereign parliament and the curtailment of the independence of the judiciary.

Bangladesh came into being with the ideals of democracy and freedom for the people. The people of the country made unprecedented sacrifices during the liberation war of a severity experienced by only a handful of countries. But what has been the result of their sacrifices? We have discussed how a parliamentary government was established immediately after the creation of Bangladesh, and how within three years, the founder of the state himself buried democracy, and established a constitutional dictatorship.

What went wrong with Bangladesh? As pointed out earlier, eminent western constitutional experts have often expressed their apprehensions about the suitability of western liberal constitutionalism or democracy as adopted by most post-colonial developing countries. The problems stem from the 'constitutional eclecticism,' noted one constitutional expert, 'the ready application to non-European societies of essentially European constitutional stereotypes. A certain minimum equivalence or identity of underlying basic societal conditions is a pre-condition to the successful reception or transfer of legal models from one system to another.'[2] Apprehensions were also expressed as to whether a western liberal model, whose basis is nineteenth century liberalism and property rights, was capable of solving the gargantuan socio-economic problems faced by Third World countries, and thereby fulfill the hopes and aspirations of the populace.

Was it then a mistake on Sheikh Mujib's part to introduce such a liberal model in a society which was baptized in blood

and born through a revolutionary war? The revolutionary war had it own pitfalls. It undoubtedly weakened the esteem for authority. It also dramatically radicalized society. Society went into a flux. Post-liberation Bangladesh thus was confronted with a situation of a country beset by socio-economic problems, and lacking proper authority, as the pre-liberation one was already destroyed. One could easily then propagate the idea that under such circumstances a revolutionary government was more suitable than the western liberal model. But one has to bear in mind that even in a post-independent society like Bangladesh, Sheikh Mujib's charisma and personal popularity worked like magic and had the weight of authority needed to run the country.

Unfortunately, Sheikh Mujib, instead of institutionalizing his charisma, started a process of personalization. This is a familiar trend in many post-colonial countries where the leaders who gained independence for their countries began to consider themselves invincible, and saw themselves as synonymous with national interest, as well as with the state. Such a notion is bound to have negative impacts on the values of constitutionalism.

Personalization of the governmental process by Sheikh Mujib thus posed a serious threat to the functioning of constitutionalism in Bangladesh, as the attitudes and behaviour of the political leaders are more important in institutionalizing constitutionalism than the institutional forms and structures of the government. Willingness on the part of political leaders, especially, of the supreme leader, to operate within the framework of the constitution is vital. The successful working of democracy in India, to a great extent, has been possible due to the leadership of Nehru and others. The willingness of Nehru and other Indian leaders to work within the framework of the constitution and their acceptance of the rule of law and constitutional procedure went a long way towards transcending any personal aggrandizement.

So a deep trust in the notion of constitutionalism among the leadership is vitally important, especially in a country like Bangladesh, which has virtually no substantial, continuing, democratic experience. Even this trust or notion, according to Professor Morris-Jones, 'does not depend necessarily on the

unconscious pursuit of liberty or other values connected with constitutionalism.' He suggested that, 'the supports of constitutionalism are simply the persistence of established channels which enable private interests to bring their views to bear on government.'[3] This view has been substantiated by the establishment of constitutional government in India, Malaysia, and other countries. It has also challenged Lipset's much discussed article, 'Some Social Requisites of Democracy, Economic Development and Political Legitimacy.' The successful growth of constitutional government or democracy does not depend necessarily on the prerequisites, but on the contrary, it depends on the democratic spirit of toleration, compromise and mutual agreement.

This is not to say that the socio-economic challenges of post-liberation Bangladesh were a lesser threat to constitutionalism. Economic mismanagement and failure to bring new social groups into the political system did, indeed, pose serious threats to the functioning of constitutional government in Bangladesh. Equality, justice, and fair play were the names of the game. The original 1972 Constitutional Charter contained provisions to realize that dream, and it was not an impossible task in the context of twentieth century constitutionalism to provide both political liberty as well as economic justice. History furnished such examples. Countries such as Canada, and the United States, have steadily marched towards building a 'welfare state' within the gambit of liberal constitutionalism, with the help of jurisprudence. The Basic Law of Germany relied on a legislative majority in order to achieve a similar goal.[4]

Their constitutions were open enough to accommodate the rising socio-economic expectations of new social groups, and the commitment of their leaders to the spirit of constitutionalism was total. McWhinney, thus, stressed that 'openness of constitutionalism to societal change' and 'commitment to the spirit of constitutionalism' are keys to such a transformation. Along with it, the actual functioning of constitutionalism is vitally important, i.e., the establishment of a limited government with more and wider participation by the people, an effective legislature, and an independent judiciary.

But when we turn to Bangladesh's scenario, we find that Mujib's personal style of politics and his overwhelming

legislative majority had, instead of institutionalizing politics, created an executive without any checks whether by the legislature or the judiciary. Neither his legislative majority nor any jurisprudence acted as a catalyst in bringing any meaningful socio-economic changes, nor did they open channels to absorb new social groups into the political system. The inevitable impacts were the perversion of the political process as well as the decline, if not total decay, of already fragile civil and political institutions. We have already noted the decline of parliament and its inability to check the arbitrary actions of the executive. We have also noted how the 'political liberty,' which is the core of constitutionalism, was muffled and suppressed by the regime. The very essence of constitutionalism is lost if the right of the citizens to propagate ideas freely and their freedom to organize opposition are taken away through various repressive acts and extra-constitutional means. When political institutions are undermined, the Opposition both inside and outside parliament become disarrayed, and extra-constitutional means become the only method challenging the government when it presents a facade of democracy. In the case of Bangladesh, the practice of extra-constitutional measures was thus inevitable.

As noted earlier, Sheikh Mujib then moved swiftly to establish a one-party dictatorship through the passage of the Fourth Amendment. We have discussed in detail the reasons for the development of such an unfortunate phenomenon. We would just like to add that with this fundamental change the institutional structure, without which the practice of constitutionalism can hardly be carried out, was gone. Before the establishment of a one-party dictatorship, constitutionalism in Bangladesh had a tenuous existence. There were hopes that the feeble Opposition, given a chance, would be able to reorganize itself, and individual political liberty was not completely destroyed, as the High Court Division of Bangladesh in many cases exercised its writ jurisdiction and guaranteed political and civil liberties of the citizens. Once a one-party dictatorship was established, 'it is meaningless to speak of a living constitution' noted a constitutional expert, 'When in fact the very characteristic of a constitutional order is no longer operative, that is to say, when its regularized restraint of governmental power in the interest of protecting a personal

sphere of the individual citizen and his voluntary associations is destroyed.'[5]

The most serious assault, besides a total decline of the legislature, on the constitutionalism under the Fourth Amendment, was the total eclipse of the independence of the judiciary, from which it is yet to recover. We have already discussed the importance of an independent judiciary and its role in preserving the constitutional order of a given country. The onslaught on the judiciary, thus, was a serious development against constitutionalism in Bangladesh. As the terms and conditions of the judges were subjected to the powers of the president, the institution became completely subservient to the executive. As long as the appointment of the judges is impartial, their salaries are charged permanently to the Consolidated Revenue Fund, one can expect judicial impartiality. But if appointment and dismissal are in the hands of the executive, the judiciary is bound to come under political influence of the party in power. 'One has to consider the psychological effect on the judges, of the possibility that the political power of dismissal might be used against him should a judge prove an obstacle to the party in power.'[6] Moreover, 'one-party government with it corollary of one-man rule, not only negates freedom of individual action which is the cardinal element in the whole concept of limited government, but also erodes the supporting mechanisms of constitutional government.'[7] One can thus hardly over-emphasize the disastrous impact of the Fourth Amendment on the nascent democracy in Bangladesh.

This was followed by *coups* and counter-*coups* leading to a period of chaos and confusion, if not total anarchy; then followed a period of martial law. Martial Law, as we have already pointed out, means negation of the rule of law and constitutionalism. The first Martial Law Administrator, the late President Ziaur Rahman, started a process of civilianization and gave the country a new political order which removed most of the undemocratic elements of one-party dictatorship established under the Fourth Amendment in January 1975. As pointed out, Zia's political system was not a true presidential or parliamentary one. Parliament under Zia lost many of its powers, most notably, the power over financial matters, which is the most effective means of restraining and controlling the executive branch.

Similarly, under President Zia's political order, the judiciary also suffered some setbacks, though not major ones, affecting its role.

President Zia's contribution to constitutionalism in Bangladesh is widely acclaimed in many quarters. But one has to bear in mind that various constitutional amendments added during Zia's martial law period were enacted through martial law proclamations and ordinances. His version of the Constitution, ratified through the Fifth Amendment, was what he 'thought' was appropriate for the country. He indeed removed many undemocratic elements of the Constitution introduced under the Fourth Amendment, but he also retained many undemocratic elements to suit his needs. For example, though he freed the judiciary somewhat from executive control he retained executive control, no matter how diluted, over the appointment and removal of judges. This situation is still maintained, which is against the spirit of constitutionalism. Again, though Zia revived the multi-party system in the country, his quest for power prompted him to encourage factionalism within the existing political parties, with splinter groups being co-opted by Zia's ruling party, the Bangladesh Nationalist Party. This action of Zia retarded the growth of healthy political parties in Bangladesh. This was also a serious impediment, to the proper functioning of constitutionalism, for as we all know a healthy democracy besides needing vital formal institutions of government, also needs informal agencies such as political parties and interest groups to keep it going.[8]

Zia was followed by a weak and ineffective civilian government for a very short period. The civilian government was, however, overthrown by another military ruler, H M Ershad, in March 1982. Then followed another period of direct martial law, which was followed by a limited or controlled democracy. After nine years of authoritarian rule, Ershad was removed by a popular uprising in November-December 1990 in which people of all sections of society participated, and some groups of the armed forces also gave support to the people's movement. As a result, Ershad's regime came to an end in December, 1990.

Ershad's nine-year rule caused another severe blow to the already stunted growth of constitutionalism in Bangladesh. One of the unfortunate realities of Third World politics is the illusion

of elections. Election rigging is almost routinely carried out in these countries, and is widely ignored by the international community. There is a common saying that it is almost impossible to have free and fair election in Third World countries. During Ershad's rule, as pointed out earlier, elections became a farce and a mockery. As a result, the growth of constitutionalism was seriously retarded due to the lack of an impartial election, the corollary of this was that the *modus operandi* for a peaceful transfer of power, or an orderly succession, was as illusive as ever. During Ershad's rule, the Constitutional Charter became merely a formal document and was subject to his personal caprice. As discussed earlier, he amended the Constitution four times, according to his political necessity. Whether it was with the introduction of Islam as the state religion, or the extension of the time period for the women's reserved seats, it was all done to suit his needs, whereas in most democracies, constitutions are amended to accommodate the hopes and aspirations of the people.

The extension of time for the women's reserved seats for another ten years by Ershad is a case in point. An important constitutional issue which dealt with 49 per cent of the electorate was not decided by the people's representatives, but through a discussion between the First Lady Roushan Ershad and two factions of the ruling Jatiyo Party. Begum Ershad who had no *locus standi* in constitutional matters was in favour of 60 reserved seats for women[9] instead of 30, whereas one faction of the Jatiyo Party favoured the abolition of reserved seats, and, the other advocated the *status quo.* Ultimately, the reserved seats for women were retained for an extended period of ten years. Such was the nature of constitutional politics in Bangladesh during the Ershad era.

After the fall of the Ershad regime, the country had its first free and fair election in February 1991. It was designated as a 'free and fair' election even by the foreign observers who came to monitor the election. By the criteria of a Third World country the election of February 1991, was free and fair although it must be added that one particular party, namely the Jatiyo Party, was not given the same opportunities and freedom of action as were given to the other parties. It is true that the Jatiyo Party was associated with the Ershad regime; it could

have been banned in the law court if it was found to be guilty of some serious crimes or irregularities. But as long as the party was not legally banned, the party should have been given the same sort of facilities and privileges as were given to all the other parties by the caretaker government headed by the Chief Justice of the country. It would have been a fresh start towards the growth of Bangladesh's nascent constitutionalism.

The challenges and dilemmas of constitutionalism in Bangladesh

Like most newly independent countries of the Third World, Bangladesh also has certain shortcomings that limit the successful operation of a constitutional government. We have referred to some of these in our introductory chapter on constitutionalism. In recent years a number of books written mainly by western scholars have elaborated and analysed the shortcomings and dilemmas of a democracy in the newly-independent countries of the Third World. An American team came to Bangladesh in early 1992 to evaluate the working of democracy in Bangladesh. Its findings may not have been 100 per cent correct but they give the reader valuable guidance to the understanding of the political process and dynamics of the country. Here we need not elaborate the problems faced by these countries; any student of comparative governments of the Third World is familiar with those problems and issues. We would prefer to mention some of the peculiar problems of Bangladesh. Constitutionalism or democracy can operate successfully if certain fundamental rules of democracy are followed. These fundamentals have been nicely summed by S M Lipset. According to Lipset, constitutionalism and democracy are political systems which are characterized by a value system allowing peaceful 'play' of power, the adherence by the 'outs' to decisions made by the 'ins' and recognition by the 'ins' of the 'outs' that there can be no stable democracy without these rules.[10] No realistic picture of the working of democratic institutions in the new countries would prove the existence of such a value system. Now the question may be raised as to whether the ruling elite or the people of Bangladesh

have followed these rules or not? The answer to such a query, however, is not fully affirmative. The governing party, even when it is elected by a fair election, seems to fail to make a distinction between opposition to the state and opposition to the government. Anybody who criticizes or opposes the government is usually branded as 'anti-state' or 'traitors.' The government, on the other hand, shows a tendency to bypass the political institutions, which weakens their stability. The government also applies 'black laws' such as preventive detention, and security acts to put opposition groups or individuals into prison. Such actions weaken the political freedoms which are so vital in maintaining a constitutional order.

The ruling elite also must perform and demonstrate its efficacy. There would inevitably be an erosion in the popularity of any regime if it fails to bring about wide-ranging socio-economic changes in the country. An army 'putsch' was possible in 1975 only when Sheikh Mujib had alienated the key societal groups due to economic mismanagement, serious law and order problems, and the erosion of civil institutions. As pointed out earlier, the present regime of Begum Zia still enjoys wide popular support. But its fate and along with it the fate of democracy in Bangladesh hangs in suspension. If the socio-economic conditions of the people are not improved and the present government does not demonstrate its efficacy and effectiveness, people will not be able to identify it with democratic values. People identify with democratic values only if they benefit under such a system. The government must prove its sincerity to the public in matters economic and politics, if democracy is to be made viable.

The liberation war of Bangladesh was fought in the name of democracy. The Awami League which spearheaded the nationalist movement had a long-standing commitment to democracy and the parliamentary form of government. The civil-military dictatorship of the Pakistan period and the use of various constitutional, political, economic and cultural mechanisms to tighten the West Pakistani ruling elites' hold on former East Pakistan had profoundly affected the emerging Bengali nationalist leaders. The internal colonization of East Pakistan was possible because of the then existing political order

of the country. During the Pakistan period (1947-71), with a short span (1958-62) of naked military dictatorship, the country was ruled by a West Pakistani ruling coterie under a constitutional facade. The absence of democracy was thought to be the most important reason for the then East Pakistanis' sufferings and humiliation.[12] The famous 'Six-point' programme, which became a charter for the Bengali nationalist movement, thus, laid specific emphasis on the importance of liberal democracy.

It was, consequently, no surprise that Bangladesh began its journey as an independent nation with a constitutional government. The legal basis of the government was provided by the Proclamation of Independence, issued on 10 April 1971, by the exiled Government of Bangladesh. The Ordinance established a presidential form of government on a provisional basis. It created an all-powerful president with both executive and legislative powers.[13]

The revolutionary government was replaced by a parliamentary form of government soon after Sheikh Mujib's return from a Pakistani jail. According to the instrument of the Provisional Constitutional Ordinance of 1972, Mujib relinquished his legislative powers given by the Proclamation of Independence Order. He proceeded to step down from the presidency to become the prime minister and a former judge, Abu Sayeed Choudhury, was made the President of the Republic. By the same ordinance, a Constituent Assembly and a Constitution Draft Committee were formed. The Draft Committee completed its task within a short span of time and the Constitution Bill was presented in the Constituent Assembly in November 1972. It came into force on 16 December 1972. Bangladesh, thus, enacted its Constitution within nine months of its independence.

The Bangladesh Constitution of 1972 established a Westminster-type of parliamentary system with some socialist overtones. Its organizational format had all the trappings of a parliamentary system. In practice, however, under the dominance of the Party and its charismatic leader, Sheikh Mujib, the country started experiencing the tyranny of brute majority rule. The power of the legislature began to wane at the expense of the all-powerful leader and his Party.

Soon the stresses and strains on the constitutional government were evidenced by the changes in the Constitution itself brought about through the Second Amendment. It granted emergency powers to the government and reduced the role of the legislature.

Far-reaching changes were brought by the controversial Fourth Amendment, which established an authoritarian presidential system and a one-party state. Thus the founder of the state himself buried democracy in Bangladesh. The contribution of the Fourth Amendment in eroding the principle of constitutionalism is quite significant.

After the change of government in 1975, following a chaotic situation and after a series of *coups* and counter-*coups*, Ziaur Rahman, the then Chief of Army consolidated his position. The civilian-military bureaucrats were able to take advantage of the political leadership due to the previous regimes inability to cope with the situation constitutionally.[14]

Ziaur Rahman then became anxious to give some civilian content to his military rule. Once he could afford to lift martial law, he was in a position to restore a multi-party system, as well as to introduce some features of a democratic system. Although the parliamentary system was not restored he managed to restore fundamental rights, a multi-party system and the lifting of controls on the press. They were all popular measures. The system of government introduced by Ziaur Rahman met the socio-political requirements of the time: a strong executive under the all-powerful presidential system and a diminished role for the legislature, initially introduced by Mujib through the Second Amendment. The system was tailor-made for Ziaur Rahman. There was a legislature, but it was not the sovereign legislature found in a parliamentary system. It was a sort of civilian-military partnership, although the Constitution did not assign any specific role to the army, as is the case of Turkey or Indonesia. But when one examines the real situation, a civilian-military partnership could be discerned. And without an independent and powerful legislature the presidential system had all the risks of being perverted into a constitutional dictatorship. The role of the 'rubber stamp' legislature was evidenced by the passage of a number of presidential decrees through the Fifth Amendment.

It was reminiscent of the action of the Constituent Assembly (second session) when it passed a number of Presidential Orders of the Constitution. It is, however, admitted that Zia's political order as compared to the system installed on 25 January 1975, was a better one.

In the interval between the Zia regime and that of Ershad, who seized power in a bloodless coup in 1982, was the Sattar regime, which was elected through a comparatively free and fair election. It was a difficult job for General Ershad to justify the 'suspension' of the Constitution. After seizing power he introduced amendments such as the one declaring Islam as the state religion, some reforms of the judiciary (which were successfully challenged in the law court) and provisions for a running mate. But none of these are fundamental changes of the sort brought about by Mujib and Zia.

After ruling the country under martial law through 1982-3, Ershad declared himself President of the country and won a 'popular' referendum. He followed the footsteps of Zia in his attempts to civilianize his regime. In his endeavour to do so, however, he was confronted with greater public opposition than Zia had faced. This was due to differences between the underlying factors of the *coups d'etats* of 1975 and 1982 The *coup* of 1975 was viewed more as a 'putsch' than a corporate *coup* because it was carried out solely by a group of young army officials belonging to the Bengal Lancers. Although the Army's corporate interests were at stake, the *coup* occurred mainly due to personal rivalries and grudges against Mujib, as well as the ineffectiveness of the Mujib government.[15]

The assumption of power by Zia was thus welcomed by the people, since he filled a dangerous power vacuum. In contrast to the 1975 scenario, the *coup* of 1982, was staged mainly due to alleged threats to the Bangladesh army's corporate interests and its nagging demand for a constitutional role in the country's affairs, as well as the personal ambition of the then Chief of the Army Staff, General H M Ershad.[16]

Ershad was successful in holding a parliamentary election in 1986 and had all Presidential Proclamations ratified that were issued during the suspended Constitution (1982-6) through the Seventh Amendment. He, however, failed to assign a constitutional role for the army.

One has to come to the sad conclusion that while constitutional government was installed soon after independence and all the features of a democratic regime were incorporated such as fundamental rights, independence of the judiciary, and division of powers between the three state organs, in reality the country's governmental structure was noted more for deviation from constitutionalism than an adherence to it. The Constitution of the country was never abrogated, instead it was kept in suspension under marital law, and subsequently the constitutional vacuums were filled by various amendments. Both Zia and Ershad declared their professed faith in democracy and promised a speedy return to democratic rule 'as soon as possible.' Mujib was the only leader who directly challenged the democratic system by establishing a one-party state. His one-party system was thought to be a better model than the Western liberal model.

All three important regimes—Mujib (1972-5), Zia (1975-81) and Ershad (1982-1990) maintained the facade of constitutionalism. There was a parody of democratic and constitutional institutions. In actual practice, all three regimes on some pretext or the other resorted to extra-constitutional means to establish autocratic rule. In the case of the Mujib era, as pointed out earlier, there was a constitutional Amendment to transform the democratic system into Constitutional dictatorship. Both Zia and Ershad began their rule by suspending the constitution and declaring martial law. In both cases the regime began with martial law and even when they lifted martial law by a process of civilianization they retained some extraordinary measures and powers, such as, the Special Powers Act, preventive detention, and emergency powers, which all went against the spirit of constitutionalism. There were differences between Zia and Ershad, but as far as the spirit of constitutionalism was concerned the difference was that of degree and not of kind.

The party system

A stable and working party system is synonymous with a stable constitutional government. Usually a system of two or multiple parties with broad ideological and social bases enhances the

chances for the smooth working of democracy. It should be noted, however, that the evolution of a party system largely depends on the social and political conglomeration of a polity. Sometimes a dominant single party is capable of aggregating and incorporating diverse interests of various social groups. But it depends on the Party's institutional strength, such as coherence, complexity, autonomy and adaptability.[17]

The Congress Party of India, which was like an umbrella organization at the time of independence, was successful in institutionalizing diverse elements into the Party because of its organizational strength, clear-cut policy preference, autonomy and adaptability. Moreover, political parties are the most essential ingredient for the working of a democracy; parties represent political views of the people and they also represent the political pluralism prevailing in a country. Well-organized political parties play a vital role by aggregating and articulating various interest groups and by providing mechanisms of conflict resolution, as well as having an impact on the policy-making process of the government. Institutionalized parties, thus, play the role of integrating the society by absorbing the new social classes into the community. Moreover, it is through the parties that people exercise their inherent right of choosing or turning out a government under which they live. Political parties, thus, should be broad-based and issue-oriented, facilitating the electorate's right to choose its government. Parties which are unable to form the government also play an important role by constructively criticizing the government, highlighting government's failure in certain areas to the electorate in order to win the next election.

As pointed out earlier, the limits of democracy in Bangladesh have been acknowledged and freely admitted in almost all quarters. Among the factors responsible for this sad state of affairs, political parties in Bangladesh bear a major, if not *the* major, responsibility. Due to the absence of open politics, political parties in Bangladesh are characterized by the politics of conspiracy, and are known to have pursued narrow sectarian interests instead of broader public interests. As a result, parties in Bangladesh are hardly based on broad principles or issues. Mostly they are personality-oriented, with followers clustering around a political leader, who in turn becomes dictatorial. In

fact, there are hardly any democratic structures or organizations within most of the parties. The leader's image and personal popularity are the main strength of the party. He is hardly challenged or questioned. Most political parties have not evolved from grassroot levels. The Awami League, the oldest and most organized party, which traces its origin back to 1949, is known to have the support of some grassroot organizations. In spite of a comparatively longer history, the Awami League reached the crest of its popularity in the mid-1960s, due to the charismatic leadership of Sheikh Mujib. Mujib's undisputed stature was a strength during the independence movement, while it proved to be a fatal weakness during the period following liberation. The nascent democratic order was soon characterized by the personalized rule of Sheikh Mujib.

The disarray in the party situation in Bangladesh can be attributed to another very important factor which is rooted deep in history. Since 1947, most political parties, because of a lack of a democratic order, became prone to agitational politics. Both the ruling and opposition parties view themselves as adversaries rather than as partners in running the governmental affairs of the country. The ruling party dubs the Opposition's criticism as anti-state, whereas the Opposition feels that it is their solemn duty to dislodge the government at any cost. Lack of experience with the working of a democratic order has instilled a deep-rooted suspicion in the minds of the politicians which has become difficult to get rid of. The parties are more prone to agitational politics than to the art of governing.

Another unfortunate fact is that none of the political parties except the Awami League is a national party with nation-wide constituencies. According to the report of the *Bangladesh Mukto Nirbachon Andolon* (BAMANA), which monitored the recent parliamentary election in 1991, except for the Awami League, most political parties' strengths are urban and region-based. The Awami League, which was instrumental in spearheading the independence movement, which grew out of nationalist movements, had become an umbrella organization. The liberation war and the traumatic birth of Bangladesh in 1971 had radicalized its politics. As a result, the post-independence Awami League differed from the pre-independence party which

was then the first opposition party in Pakistan. Judged by the criteria of political parties in other Third World states, the Awami League, with its organizational structure, grassroot support, and effective leadership could be regarded as a properly-organized party.

In 1972, the Awami League was almost the only party in Bangladesh. The rightist parties were banned for their alleged 'collaboration' with the Pakistan army during the liberation war. The leftist parties had very little role in the country's Parliament. The first Parliament was almost entirely dominated by the Awami League and there was hardly any effective opposition party, which is regarded as an unhealthy feature in parliamentary democracy. Unfortunately, the Awami League did not escape from the perturbing problem of factionalism. In 1954, even before the creation of Bangladesh, a powerful group in the Party split off and formed a new Party known as National Awami Pārty (NAP). After the death of its supreme leader, Suhrawardy, there were internal squabbling and factionalism within the Awami League. But by 1968-9, Mujib had established himself as its effective, if not, sole leader; he had a party organizational framework and enjoyed wide popular support. He successfully challenged the Pakistan government and in due course became the founder of Bangladesh.

The more serious hindrance or threat to the functioning of democracy was the tendency of the Awami League, in particular of its leader Mujib, not to tolerate any opposition to the ruling regime. Opposition to the government was quite often misinterpreted as 'opposition to the state.' This was not at all a healthy factor in the evolution of constitutionalism. The single-party system, though not in theory but in practice, was a major limiting factor for the nascent democracy. Subsequently, Mujib, by the Fourth Amendment to the Constitution, formally established a one-party constitutional dictatorship.

The factionalism within the Awami League during the post-independence era was, however, further exacerbated due to controversy over the nature of socialism to be introduced in the country and conflicts among the young Awami League workers. Thanks to the infighting within the party, the Awami League soon started to lose its effectiveness as an organizational weapon. On 23 October 1974 the pro-Moscow Tajuddin openly

split with the Prime Minister, and was asked to resign from the Cabinet.

Of the other two major political parties, neither the Bangladesh Nationalist Party nor the Jatiyo Party evolved from the grassroot level. They were floated by Zia and Ershad in their efforts to legitimize and civilianize their rule. Both parties are a conglomeration of politicians from different political parties with various political beliefs, covering a wide spectrum from the far left to the far right. Relatively speaking, this tendency of hero worship is less evident in the extreme rightist and leftist parties. The main function of both Bangladesh Nationalist and Jatiyo parties was to recruit supporters through political patronage. The followers of these parties without any broad support base were in no position to challenge their leaders. Personalization of politics was, thus, a prominent trend in both the Bangladesh Nationalist Party and the Jatiyo Party.

It may sound paradoxical, but it is correct to say that democratic parties like the Awami League, the Bangladesh Nationalist Party and the Jatiyo Party are less developed democratically than the left and right-wing ones. Although the Bangladesh Nationalist Party since its inception has gone through a profound transformation, the dissatisfaction and behind the scene criticism of Begum Khaleda Zia, the present President of the Party about her alleged authoritarian treatment of her parliamentary Party members demonstrate the lack of democracy within the Party. It is difficult to maintain democracy at the governmental level if there is no democracy within the party unit.

Lack of party discipline is another important issue facing democracy in Bangladesh. If we examine carefully the actual functioning of three major 'democratic' political parties. The Awami League, the Bangladesh Nationalist Party and Jatiyo Party we find that there is hardly any discipline or loyalty among their rank and file. This is one of the main reasons why there are so many groups, factions and sub-factions within the parties. The opportunistic nature of politicians also spurred the proliferation of factionalism. Factionalism was further compounded during the civilianization process of the Zia/ Ershad military rule. In the process of civilianization of their systems, the military leaders could always 'procure' support

from some factions of the democratic parties. The two military presidents of the country, Zia and Ershad, could thus easily manage to get support from some factions of the opposition parties by offering them political positions and privileges. As a result, there are now, at least on paper, more than 100 political parties, of which 70 contested the election in 1991. In reality, however, the number of significant parties is not more than half a dozen. They are: the Awami League, the Bangladesh Nationalist Party, Jatiyo Party, Jamaat-i-Islami, National Awami Party (M) and a conglomeration of leftist parties. Unless the political parties demonstrate their organizational strength at the grassroots level and bring the majority of the population into the mainstream of the political system, constitutionalism and democracy will be under serious constraints and stresses.

If one wishes to ensure political stability and prevent the periodic rise of an authoritarian regime, much has to be done to improve the quality of the party system in Bangladesh.

Politicized military establishment

In undivided Pakistan, the inordinate ambitions of some top army generals and bureaucrats contributed to the collapse of democracy in that country. Military bureaucrats are capable of seizing state power in most post-colonial countries because they have inherited an 'overdeveloped state apparatus' from their colonial rulers.

The Bangladesh military establishment is different both from the Pakistan and Indian armies. The Pakistan army is political but cohesive, whereas the Indian army is apolitical in the true sense of the term. Unfortunately, the history of the Bangladesh army is intertwined with the traumatic, confusion and bloody history of the country. The army personnel who deserted the Pakistan army in the wake of the liberation war did so on their own initiative, and were thus drawn directly to fight for a political cause and, thus, truly become a revolutionary army. The nucleus of the Bangladesh army was formed initially from this highly politically-motivated group.

To make matters worse, like the rest of society, the army was highly factionalized, especially after the return of a large

number of Bengali expatriates, who were held in the then West Pakistan. The basis of the division was along the lines of 'freedom fighter' versus the 'returnee.' This highly-politicized and fractionalized army added a far-reaching dimension to the already chaotic political situation of the country. The army in Bangladesh was, as a matter of fact, given ample opportunity to step into the political situation of the country. The reasons were many. First, they were well acquainted with the political role played by the Pakistani army and as junior partners, they had no difficulty in absorbing that culture. Second, during the post-liberation period they watched from close quarters the ineffective management of state affairs by the civil administration. Third, the formation of the para-military *Rakhi Bahini* became a source of intense irritation to the established army. Lastly, repeated use of the army by Mujib to administer civilian affairs finally triggered the *coup* of 1975. There were, however, other factors involved. As one expert pointed out, it was more a 'putsch' rather than a regular *coup* as it was carried out by only a handful of army officials who wanted to save the country from total disintegration. It indeed came in the wake of corruption, stagnation and breakdown of democratic institutions.

Once in power, the military of Bangladesh regrouped and reorganized under the Zia regime and forged a close partnership with the civilian bureaucrats. The rise of authoritarian institutions at the cost of political institutions has been, indeed, detrimental to the process of constitutionalism. Since then, the Bangladesh military has profoundly affected the political system of Bangladesh.[18] The decision-making process was effectively transformed in the hands of the bureaucratic elite rather than in the political ones, despite the fact that both Zia and Ershad had civilianized their regimes complete with the trappings of civilian institutions. The army, however, remained factionalized in spite of Zia's ruthless purging of army personnel in 1977-8.

General Ershad, however, tried and somewhat successfully made the army a cohesive one. This was unlike Zia, who had to constantly cope with the problem of factionalism within the military, Ershad's support from the army was more or less solid. His endeavour to give a constitutional role to the army was not successful, as evidenced by the shelving of the District Bill,

which would have given the army an institutionalized role in district management committees.

The fact of the matter is that in spite of the Bengalis' overwhelming urge for a democratic order, Bangladesh has been ruled by the military for fourteen out of its twenty years of independence. The army has become the most powerful institution and the final arbitrator in the political affairs of the country.[19]

One redeeming feature was the role of the army during the democracy movement of 1990, in which President Ershad was overthrown. It seems that over the last twenty years of independence, a young group of army officials commissioned during the post-liberation period, have developed a different notion about the army's political role. They hold the ranks of Lt. Colonels, Colonels and Brigadiers, the ones who actually hold the fire power and call themselves nationalists and who allegedly played a crucial role in the overthrow of President Ershad. It is reported that it was their refusal to support Ershad that finally made the dictator relinquish his power. This is not to say that the army in Bangladesh has made up its mind to exclude itself from playing any political role. It is still far from a cohesive body. It is alleged that even in this young group there are three opinions. One group adheres to complete professionalism, whereas the second group feels that if things go wrong, they would certainly have a meaningful role to play, while the third group is, sitting on the fence, and would be willing to take side with the winning faction. One must also remember that army intervention in politics arises due to various other factors, of which the role and effectiveness of the civilian government is most important.

Leadership crisis

Bangladesh, since its inception, has been suffering from a leadership crisis.[20] Independence was accompanied by the rise of a charismatic leadership, which according to many experts, is common in transitional societies. The critical choices made by the leaders and the elite are extremely important because the conditions under which new social forces begin to participate continue to direct and influence their activities.

Sheikh Mujib was a leader with great personal appeal. He was the 'Bangabandhu,' 'the father of the nation,' and unchallenged leader of seventy-million Bengalis. His authority was unquestionable. But due to his lack of organizational ability, he could not, or did not, transform the Awami League or the ruling regime into a proper organizational structure. The politics of patronage and personal loyalty, which acted as the bedrock of Awami League political actions during the pre-independence era, actually weakened the organizational strengths of the post-independence Awami League. Moreover, personalization of power in Mujib weakened the autonomy, the coherence and the discipline of the Party. Thus the rise of a personality cult hampered the orderly succession and recruitment of leadership. Unwillingness on the part of charismatic leaders to institutionalize the political process by parting with personal power eventually turned the system into a personal one.

Mujib was no different from other Third World leaders who think that they are indispensable. Everything must be decided by them, otherwise the country cannot survive. He thus, turned the governmental machinery into a personal, one-man show: he would decide even small details, leaving no scope for a sound administrative framework. His enormous personal power and his intolerant personality went a long way in retarding the healthy growth of autonomous, independent and free institutions like the press and media which are so vital for the working of a sustainable democracy. His initial attempts to bring the bureaucracy under political control were highly commendable, but his inability to maintain a coherent party structure slowly and surely made him dependent on top civil servants. The civil servants who had begun to loose their *esprit-de-corp* soon started to wield power at the cost of the legislature. The legislature began to degenerate into a 'rubber stamp' legislature while Mujib, unlike Nehru of India, was unable to institutionalize his charisma, which had negative effects on the evolution of a healthy political order. The unfortunate tendency of the one-man show continued during the two subsequent regimes of Zia and Ershad.[21]

Thus the leadership crisis also became a serious limiting factor for democracy in Bangladesh. Zia was also a charismatic leader and had great popular appeal. Most observers believe in his

sincerity concerning the country's developmental programmes and his faith in Bangladesh's destiny. But his leadership was flawed due to his inability to build political institutions. While in power, he depended more on civilian-military bureaucratic institutions than on political ones. His encouragement of factionalism in the opposition parties and his use of the legislature as a 'rubber stamp,' created serious complications for the sound growth of constitutionalism.

Ershad's long era was also noted for his encouragement of factionalism within the opposition parties. But his greatest disservice to democracy and constitutionalism was the destruction of the election process. Free, fair and periodic elections are a *sine qua non* of democracy, but Ershad destroyed the whole process of free and fair elections. Elections held under his regime were simply a farce and a mockery. There was on the part of all three leaders, a lack of commitment to democratic traditions which Juan Linz calls 'loyalty' to the democratic system. Toleration, rejection of violence and unconstitutional means to gain power, or to condone anti-democratic actions by other participants are all part of such a loyalty.[22] Since Ershad's fall in December 1990, a free and fair election, however, has been held Bangladesh.

There should be, however, no doubt that the rise of authoritarian institutions at the cost of political institutions has been detrimental to the process of constitutionalism. The ineffectiveness of political institutions and military interventions has created a vicious circle of the 'which comes first' syndrome. The military must realize (especially since the fall of Ershad) that no matter how weak and ineffective political institutions are, they should nevertheless, be given a chance to take root. Periodic intervention by the army does not create such a congenial atmosphere.

Bureaucracy

The bureaucracy is an essential element of a modern state. While the popularly elected ministers provide the democratic element, the bureaucracy provides expertise and knowledge. A synthesis of both is needed for the successful working of any form of democratic government.

We cannot describe the role and nature of bureaucracy in Bangladesh without some reference to its growth and functioning, first in British India and then in undivided Pakistan. Since there is enough material on the historical development of the bureaucracy and the civil service in the sub-continent, we will simply mention that the British developed a large and structured bureaucracy in order to maintain law and order and to serve British colonial interests. Representative institutions were introduced, but the bureaucracy remained outside the purview of India's political leaders. Here we shall confine our survey to the role of bureaucracy in Bangladesh since the country's inception.

In undivided Pakistan the officials who formed the civil service or bureaucracy in the former East Pakistan were the junior partners of the Pakistan civil service. In Pakistan, where democracy was practically eclipsed after 1958, bureaucracy played a highly political role. The British tradition of an impartial and non-partisan civil service had been destroyed. Civil-military dictators such as Ghulam Mohammed, Iskander Mirza and Ayub Khan had no faith in the people's ability to rule. Rather they believed in the civil-military partnership in which top army officials and bureaucrats ran the administration. Bengali members of the erstwhile Pakistan civil service did not directly take part in the national decision-making process, but they watched the political role of the civil servants from close quarter and seemed to have developed a longing for the return of a dominating political role for the civil services.

When Bangladesh was created the political leadership was not effective. It was true that Mujib's authority could not be challenged by any top civil servant, but Mujib was not a capable or experienced administrator. The Awami League ministers, with the exception of one or two, were also not sufficiently experienced or capable of challenging effectively the inherent tendencies of the civil servants to dominate. The political parties and parliament too were not at that stage of development, so as to challenge the bureaucracy.

In spite of this the bureaucracy was initially relegated to the background due to the Awami League's pre-independence promise to democratize the administrative system, including a radical restructuring of the civil service. Mujib was highly

critical of the bureaucrats and was determined to restructure the entire administrative system. Accordingly certain measures were taken by the regime which weakened the bureaucracy. It was further weakened by an internal schism and factionalism. Their morale was at its lowest during 1972-4.

Due to subsequent political developments like the factionalism and fragmentation of the Awami League, inefficient management of the economy, rampant corruption and the challenge from the radical left, Sheikh Mujib started to rely heavily on the bureaucracy. The bureaucratic elites who had lost their *esprit de corps* soon forged unity and cohesion within their ranks. The corruption and internal weakness of the Mujibur Rahman government finally provided an opportunity for the bureaucratic elite to dominate the country's political process.

Then came the period of full or quasi-military rule (1975-90). It is almost a truism that civil servants under an authoritarian government, whether civilian or military, exercise greater power and influence than under a properly-constituted democratic system where there is a vigilant parliament.

The civil-military bureaucratic apparatus came to the forefront of state management with Zia's coming to power. In order to consolidate his rule Zia, co-opted many civil servants by appointing them to the Council of Advisers formed in 1975 and to key ministerial positions. The civil servants, thus, could exert enormous influence in political decision making. Whereas in a democratic system, policy making is the primary responsibility of the ministries, Zia's policy of civilianization and his mass-oriented administration, without the support of a truly-popular party, put policy-making responsibilities under bureaucratic control. The bureaucrats were virtually in control of both policy formulation and policy implementation. Civil servants were deployed in the self-reliant and institution-building programmes. The thorough bureaucratization of administration by Zia helped the civil-military apparatus to become the dominant elites of the country. Zia's hand-made political party, on the other hand, without much popular support, was in no position to threaten the bureaucratic elite.

Zia's civil-military state apparatus came under a civilian regime for a brief period. Due to the weakness of the democratic institutions, the regime was unable to withstand the onslaught

of an army intervention. During Ershad's nine-year rule the civil-military bureaucracy became more entrenched. Top civil and military officials held important positions and were involved in critical policy formulation. They maintained their positions in spite of Ershad's civilianization process and 'decentralization' at the Upzilla level. No impediments were created to challenge the dominance of the bureaucracy in Bangladesh.

In Bangladesh, as pointed out earlier, neither a vigilant parliament nor a responsible executive was in existence to restrain the political ambitions of the civil servants. As such, under both the military regimes of Zia and Ershad, top civil servants had direct access to the president and could sometimes even override the decisions of their ministers by invoking the president's support. The rules of business as they existed in Bangladesh allowed a matter to be referred to the president in case of a difference of opinion between the minister and his departmental secretary. There were many instances when both Zia and Ershad used to, in such cases, prefer the opinion of the departmental secretaries over those of the ministers. Obviously, under such circumstances the civil servants developed a superiority complex *vis-á-vis* their ministers.

Thus, during the period of 1975-90 when the country was ruled by the civil-military bureaucracy under the facade of civilian rule, the civil-military apparatus became the key element in the management of state affairs. In the absence of strong political institutions the bureaucracy took control of the scarce resources and was in a position to distribute patronage, whereas the political parties were unable to build any local bases due to their disadvantageous position.

The overdeveloped bureaucracy in Bangladesh, thus, is an entrenched interest group. The enlargement of state instruments with no corresponding development in the political sector has made this group formidably powerful. They have at their disposal an enormous amount of patronage which would be difficult for them to give up.

With the introduction of the parliamentary system under Begum Zia in 1991, the situation as yet seems not to have changed in any significant way. The initial witch-hunting by the present government created some inertia but the bureaucracy seems to have consolidated its position. The top civil servants

still have direct access to the prime minister. It is reported in certain quarters that Begum Zia wanted to change the rules of business to curb the domination of the civil servants, but thanks to opposition from the all-powerful bureaucracy, it has not yet been achieved. Some of the bureaucrats still have greater power and influence than their ministers. It is, however, true that some members of Begum Zia's Cabinet are closer to her and they can successfully resist the dominating role of the civil servants. But, basically, the relationship between the popularly-elected ministers and experienced civil servants is the same as has been the case since 1971, and in particular since 1975.

The bureaucrats are still in a position to thwart any major initiative taken by the regime, such as privatization and ending subsidies in the public sector. A lack of accountability, or a monitoring of their performance and a proper auditing system further enhance their invincibility and power. Thanks to a lack of ministerial experience, some policies of liberalization, for example, of foreign-exchange access, have been diluted. They have not also supported the government's policy of deregulation in the public sector, which would be detrimental to their interests. Even to this day, in the private sector, one has to cross forty-nine bureaucratic barriers in order to get a government licence. The larger the number of barriers, the greater are the chances of manipulation. There is, however, still scope for bringing about a synthesis in the relationship between the bureaucracy and the ministers.

Socio-economic factors

Judging by macro-economic measures, i.e., GNP, per capita income, percentage of rural and urbanized population, the capacity of the agricultural population to contribute to the commercial market and related socio-economic statistics, Bangladesh is one of the poorest countries of the world. It has meagre natural resources and the highest man-land ratio in the world.[23]

In spite of the infusion of huge amounts of foreign aid by donor countries since independence, the political economy of

the country remains grim. An overview of social and economic conditions continue to portray a very dismal situation. The high population growth rate (2.8%), the prevalence of poverty (89% of the population live below the poverty line), a high illiteracy rate (70%), poor health facilities (6730 persons per physician), low life expectancy (58 years), high infant mortality (116/1000) all substantiate the grim assessments of the situation.[24] The people of Bangladesh waged the liberation war not only to gain political freedom but economic freedom as well. Since independence, every regime has been confronted with huge socio-economic problems and the problem of equitable distribution of the meagre resources among its population. These gigantic socio-economic problems have contributed greatly to political instability and widespread corruption. One big aid scandal in Bangladesh concerns electricity generation. The transmission losses have been huge, and as a commentator has aptly put it, 'Bangladesh is experiencing not survival strategies or petty theft but grand larceny.'[25]

Both horizontal and vertical cleavages exist in Bangladesh society, though the country is remarkably homogeneous. The rural-urban gap as well as the rich-poor gap, are all too evident. While this is common to most Third World countries, what makes the 'gap' in Bangladesh so volatile is the high ratio and the way the urban and rural populations are distributed. A majority (i.e., 80%) of the country's population live in the rural areas, 65% of whom are landless, whereas another 20% own tiny farms but need to supplement their farm income with other farm-related labour. A small percentage (about 5%) who form the rural gentry have small businesses and trades besides having land which they themselves don't work on. But as noted earlier, most people in Bangladesh belong to the category who live below the poverty line.

An alarming picture has been painted by a recent report of the Bangladesh Institute of Development Studies (BIDS), which stated that in all respects, i.e., their purchasing capability, opportunities for education and health-care, susceptibility to natural disasters, and malnutrition, the condition of the rural population has deteriorated progressively over the last three years.[26]

They are the marginalized group and do not play an active role in the country's affairs. The urban population, including

the industrialized workers, the lower and middle classes, and the upper-middle class, are the key players. The political system of the country is controlled by them in varying degrees and they are mostly successful in getting their interests served through various mechanisms. Moreover, a new urban elite has become unbelievably rich, mainly by seemingly unfair means, while the rural population is becoming poorer and poorer.[27]

Economic management by each regime has been disappointing. The socio-economic injustices and unfair distribution of the country's meagre wealth have been the most serious challenge to constitutionalism, as we all know the economic factor is the single largest threat to a constitutional state. We must remember that twentieth-century constitutionalism does not only guarantee political rights of the individual, but economic rights as well.

Lastly, the leaders of Bangladesh, beginning with Sheikh Mujib, while paying lip-service to the Constitutional Charter have hampered its actual functioning. Leaders' commitment to a constitutional order is important. It is obvious that such a commitment was not forthcoming in Bangladesh's constitutional history. This was demonstrated by the way Sheikh Mujib became the President under the Fourth Amendment. Similarly, Mushtaq, whose oath-taking deviated from the constitutional provisions, had those provisions postponed (Articles 48 and 55) through a proclamation. Subsequently, both Ziaur Rahman and Ershad suspended the Constitution and revived it section by section through proclamations after necessary amendments, to suit their political needs. A number of proclamations were also made part of the Constitutional Charter of 1972. The Constitution, which is the supreme law of the land, has had an ephemeral existence not only due to the imposition of martial laws but also due to the personal caprice of the reigning rulers. The result is the aberration of the inner core of constitutionalism, i.e., the formal document, by all three major rulers of Bangladesh. Its second layer, i.e., any historical jurisprudence which eventually becomes a part of the traditions and conventions of a country, was totally lacking. And lastly, the outer layer, i.e., non-formal agencies of constitutionalism such as political parties, etc., have had an intermittent growth.

What, then is the fate of democracy in Bangladesh? The answer should not be completely negative. The people of Bangladesh demonstrated in 1971, as well as in November-December 1990, that they have, and can rise against authoritarian rule. They have faith in democracy and ultimately it will prevail in Bangladesh. The burden lies with the leaders and the political elite of Bangladesh, who must demonstrate respect for the constitutional rules of the game, and respect them in spirit as well as letter, since these are the ultimate rules of a constitutional system.

NOTES

1. McWhinney, Edward, *Constitution-making, Principle, Process, Practice*, (Toronto: University of Toronto Press, 1981), p. 2.
2. Ibid, p. 6.
3. Morris-Jones, W H, *Behaviour and Ideas in Political India*, in Spann, R N, Constitutionalism in Asia, (New York: Asia Publishing House, 1963), p. 320.
4. McWninney, Edward, op. cit., p. 20.
5. Friedrich, C J, 'Constitutionalism For Emergent Political Orders,' p. 21, cited in Nwabuezc, B O, *Constitutaionalism in Emergent Nations*, (Rutherford: Fairleigh University press, 1973), p. 142.
6. Nwabuezc, B O, *Constitutionalism in Emergent Nations*, (Rutherford: Fairleigh University Press, 1973), p. 145.
7. Ibid, p. 159.
8. Magrath, C P, *Constitutionalism and Democracy: Conflicts and Consensus*, (Glenview, Ilinois: Scott, Foresman & Company, 1968), p. 315.
9. *The Bangladesh Observer*, 20 November 1989.
10. Lipset, S M, *'Some Social Requisites of Democracy,' American Political Science Review*, Vol. 53, pp. 103-4.
11. For details, see, Ahmed, Moudud, *Bangladesh: Constitutional Quest for Autonomy*, (Dhaka: University Press Ltd, 1972); and Choudhury, G W, *Democracy in Pakistan*, (Dhaka: University Press Ltd, 1963).
12. For details, see, Jahan, Rounaq, *Pakistan: Failure of National Integration*, (New York: Columbia University Press, 1972); Sayeed, Khalid B, *The Political System in Pakistan*, (Boston: Houghton Miffin Company, 1967); and Choudhury, G W, *Democracy in Pakistan*, op. cit., 1968.
13. *The Proclamation of Independence Order*, (Dhaka: Bangladesh Secretariat of Jatiyo Sangsad, 1989), pp. 40-50.
14. Ahamed, Emajuddin, *'Dominant Bureaucratic Elites in Bangladesh,' The Indian Political Science Review*, Vol. XIII, No. 1 January, 1979, pp. 31.
15. Lunstead, J, *'The Armed Forces in Bangladesh Society,'* in Olson, E A, & Jurika,

S. Jr, (eds.), *The Armed Forces in Contemporary Asian Studies*, (Boulder-London: Westview Press, 1986).
16. Baxter, Craig, & Rahman, Syedur, *'Bangladesh Military Political Institutionalization and Economic Development,'* in Kennedy, Charles, H., & Loucher, David, J, (eds.), *Civil-Military Interaction in Asia and Africa*, (Leiden: E. J. Brill, 1991).
17. Huntington, S P, *Political Order in Changing Societies*, (New Haven: Yale University Press, 1963).
18. Lunsted J, op. cit.
19. Ahamed, Emajuddin, *The Military Rule and the Myth of Democracy*, (Dhaka: University Press Ltd, 1987).
20. Khan, Z A, *Leadership Crisis in Bangladesh*, (Dhaka: University Press Ltd, 1984).
21. Baxter, Craig, *'Bangladesh in 1990,' Asian Survey*, Vol. XXI, No. 2, February 1992.
22. Linz, J, *The Breakdown of Democratic Regimes: Crisis, Reequilibration*, (Baltimore: Johns Hopkins University, 1978).
23. Laporte, Robert, Jr, *'Pakistan and Bangladesh,'* in Kearny, Robert N, *(ed.), Politics and Modernization in South and Southeast Asia*, (New York: Schenkman Publishing Company, 1975).
24. *Human Development Report, 1991*, United Nations Development Program, New York, pp. 153.
25. *International Strategies*, November/December, 1991.
26. *The Bangladesh Observer*, 16 February 1992.
27. See the *Report of Growing Povertization in Bangladesh*, unpublished document by the Scandinavian Embassies in Dhaka, 1985.

Bibliography

A. Documents and Reports

1. Bangladesh Gazette Extraordinary.
2. Comptroller-General Ordinance, 1972.
3. Constituent Assembly Members (Cessation of Membership) Order, 1972.
4. Constitution of Bangladesh, 1972.
5. Constitution (Fourth Amendment), 1975.
6. Constitution (Fifth Amendment), 1979.
7. Constitution (Twelfth Amendment) Bill, 1991.
8. Coordinating Council for Human Rights in Bangladesh (CCHRB).
9. Election Commission, Report of the First General Election to Parliament in Bangladesh, 1973.
10. Election Commission, Report of Ganovote (Referendum), 30 May 1979.
11. Election Commission, Report of Parliamentary Election, 1979 Dhaka, 1982.
12. Judiciary Bill, 1991.
13. Ombudsman Act, 9 April 1980.
14. Parliament Election Report, 1991 Observation Report.
15. Proceedings of Constituent Assembly, 1972.
16. Proceedings of *Jatiyo Sangsad*, 1973-5.
17. Proceedings of *Jatiyo Sangsad*, 1979-81.
18. Proceedings of *Jatiyo Sangsad*, 1988-9.
19. Proceedings of *Jatiyo Sangsad*, 1988-90.
20. Proceedings of *Jatiyo Sangsad*, 1991.
21. Proclamation (Third Amendment) Order, 1984.
22. Proclamation of Independence Order, 10 April 1971.
23. Provisional Constitution of Bangladesh Order, 1972.
24. Report of the Bangladesh Democracy Assessment Team, 1992.
25. Report of the Growing Povertization in Bangladesh, unpublished Document by the Scandinavian Embassies in Dhaka, 1985.
26. Representation of the People (Seats for Women) Order, 1972.
27. Representation of the People (Seats for Women) Order, (Amendment), 1979.
28. World Bank, *Bangladesh: Managing Public Resources for Higher Growth*, Report No. 9379-BD (Washington: World Bank, April 1992).
29. World Bank, *Bangladesh: Managing the Adjustment Process? An Appraisal*, Report No. 8344-BD (Washington: World Bank, March 1990).

B. Books

Abdullah, Abu, (ed.), *Modernization at Bay: Structure and Change in Bangladesh*, (Dhaka : University Press Limited, 1991).

Abraham, Henry J, *The Judicial Process*, 5th ed., (London-New York-Toronto: Oxford University Press, 1986).

Ahamed Emajuddin, *Society and Politics in Bangladesh* (Dhaka: Academic Publishers, 1989).

Ahamed, Emajuddin, *Military Rule and the Myth of Democracy*, (Dhaka : University Press Limited, 1989).

Ahmed, Abul Mansur, *"Amar Dekha Rajnitir Panchash Bachar" (Fifty Years of Politics as I saw it)*, (Dhaka : Nauroj Kitabistan, 1975).

Ahmed, Moudud, *Bangladesh : Constitutional Quest for Autonomy*, (Dhaka : University Press Limited, 1978).

Ahmed, Moudud, *The Era of Sheikh Mujib* (Dhaka : University Press Limited, 1983).

Ahmed, Rafiuddin, (ed.), *Religion, Nationalism and Politics in Bangladesh*, (New Delhi : South Asian Publishers, 1990).

Almond, G, and Coleman, S J, *The Politics of Developing Areas*, (Princeton, N.J. : Princeton University Press, 1985).

Al-Razze, Aleem, *Constitutional Glimpses of Martial Law in India, Pakistan and Bangladesh*, (Dhaka : University Press Limited, 1988).

Austin, Granville, *The Indian Constitution: Cornerstone of a Nation* , (Oxford : Clarendon Press, 1966).

Ayoob, Mohammad, & Others., *Bangladesh : A Struggle for Nationhood*, (New Delhi-London : Vikas Publications, 1971).

Ayoob, Mohammad, and Subrahmenyan, *Liberation War*, (New Delhi : S Chand and Co. (Pvt.) Ltd., 1972).

Ball, Nicole, *Regional Conflict and International System*, (Institute for the Study of International Organization, University of Sussex, 1971).

Baxter, Craig, *Bangladesh: A New Nation in An Old Setting*, (Boulder: Westview Press, 1986).

Baxter, Craig, Malik Yogendra K, Kennedy, Charles H, and Robert C, Government and Politics in South Asia, (Boulder: Westview Press 1987).

Byuiya, Wadud A, *Emergence of Bangladesh and Role of Awami League*, (New Delhi: Vikas Publishing House, 1982).

Blondel, J, *Comparative Legislatures*, (New Jersey : Prentice-Hall, 1973).

Bogdanor, Vernon, (ed.), *Constitutions in Democratic Politics*, (Aldershot, England: Gower Publishing Company Ltd., 1988).

Brienen, Henry, (ed.), *The Military and Modernization*, (Chicago-New York : Basic Books, 1973).

Choudhury, Dilara, *Bangladesh and the South Asian International System*, (London : Scorpion Publishers, 1992).

Choudhury, G W, *The Last Days of United Pakistan*, (London: C. Hurst, 1974).

Choudhury, Justice Badrul Haider, *Evolution of Supreme Court of Bangladesh*, (Dhaka : University of Dhaka, 1990).

Faaland, Just, *Aid and Influences : The Case of Bangladesh*, (London : The Macmillan Press Ltd., 1981).

Feldman, Herbert, *The End and The Beginning*, (London : Oxford University Press, 1975).

Franda, Marcus, *Bangladesh : The First Decade*, (New Hampshire : South Asian Publishers, 1980).

Franda, Marcus, *Bangladesh, Nationalism and Ziaur Rahman's Presidency, Part II*, (American Universities Field Staff Reports No. 8, 1981).

Friedrich, C J, *(Constitution and Constitutionalism), in International Encyclopedia of Social Sciences*, Sills, David R, (ed.), (USA : Macmillan & Free Press, 1968).

Friedrich, C J, *Constitutional Government and Democracy*, (Lexington, Massachusettes : Zerox College Publishing, 1968).

Gledhill, Alan, *The British Commonwealth : The Development of its Laws and Constitutions*, Vol. 8. *(Pakistan)*, (London : Stevens & Son Ltd., 1957).

Hafiz, Abdul M, & Khan, Abdur Rob, (ed.), *Nation Building in Bangladesh*, (Dhaka : Bangladesh Institute of International and Strategic Studies, 1986).

Hafiz, Abdul M, & Iftekharuzzaman, *Bangladesh in the 1990s: Society, Polity and Economy*, (Dhaka : Bangladesh Institute of International and Strategic Studies, 1990).

Hakim, Abdul S, *Begum Khaleda Zia of Bangladesh : A Political Biography*, (New Delhi: Vikas Publishing House, 1992).

Harun, Shamsul Huda, *Bangladesh Voting Behaviour : A Psychological Study, 1973*, (Dhaka : Dhaka University, 1986).

Hartmann, Betsy, and James K Boyce, *A Quiet Violence : View from a Bangladesh Village*, (Dhaka : University Press Limited, 1983).

Hasan, Maidul, *Muldhara-71 (Mainstream-71)*, (Dhaka : Dhaka University Press, 1986).

Hasanuzzaman, Al Masud, *Bangladesh : Crisis of Political Development*, (Savar, Dhaka: Department of Government and Politics, Jahangirnagar University, 1988).

Henderson, Geogory, (ed.), *Divided Nations in a Divided World*, (New York, McKay, 1974).

Homes, Stephen, *"Gag Rule or the Politics of Omission"*, in Elster, Jon, and Slagstad, Rune, (eds.), *Constitutionalism and Democracy*, (New York : Cambridge University Press, 1988).

Hossain, Golam, (ed.), *Bangladesh: Government and Politics*, (Dhaka : Academic Publishers, 1992).

Huntington, S P, *Political Order in Changing Societies*, (Boston : Houghton-Miffin, 1967).

Hussain, Shawkat Ara, *Politics and Society in Bengal*, (Dhaka : Bangla Academy, 1991).

Huque, Ahmed Shafiqual, *Politics and Administration in Bangladesh : Problems of Participation*, (Dhaka : University Press Limited, 1980).

Islam, Major (Retd.), *A Tale of Millions*, (Dhaka : Adeyle Brothers & Co., 1974).

Islam, Nurul, *Development Planning in Bangladesh : A Study in Political Economy*, (London : C Hurst, 1977).

Islam, Rafiqul, *Bangladesh Samorik Shason ar Ganotanter Sangkat*, (Dhaka : University Press Limited, 1989).

Islam, Serajul S, *Bangladesh : State and Ecnomic Strategy,* (Dhaka : University Press Limited, 1989).

Jahan, Rounaq, *Bangladesh : Problems and Issues,* (Dhaka : University Press Limited, 1987).

Jahan Rounaq, *Pakistan The Failure in National Integration* (New York, Columbia University Press, 1972).

Kearny, Robert N, *Politics and Modernization in South and Southeast Asia,* (New York-London : Sckenkman Publishing Company, 1975).

Kennedy, Charles H, and Louscher, David, J, (eds.), *Civil-Military Interaction in Asia and Africa,* (Leiden, New York : E J Brill, 1990).

Khan Mohammad Mohabbat, and Thorp, John P, (eds.), *Bangladesh : Society, Politics and Bureaucracy,* (Dhaka : Centre for Administrative Studies, 1980).

Khan, Mohammad Mohabbat, and Zafarullah, (eds.,) *Politics and Bureaucracy in a New Nation: Bangladesh,* (Dhaka : Centre for Administrative Studies, 1980).

Khan Zillur R, *Leadership Crisis in Bangladesh,* (Dhaka : University Press Limited, 1984).

Lyon, Peter, & James Manor, (eds.), *Transfer and Transformation : Political Institutions in New Commonwealth,* (Leicester: Leicester University Press, 1983).

Lifschultz, Lawrence, *Bangladesh : The Unfinished Revolution,* (London: Zed Press, 1979).

Maniruzzaman, Talukdar, *Group Interests and Political Changes : Studies of Pakistan and Bangladesh,* (Dhaka : South Asian Publishers, 1982).

Maniruzzaman, Talukdar, *Radical Politics and the Emergence of Bangladesh,* (Dhaka : Bangladesh Books International Ltd., 1975).

Maniruzzaman, Talukdar, *The Bangladesh Revolution and Its Aftermath,* (Dhaka : University Press Ltd., 1976).

O'Donnel, Peter, *Bangladesh, Biography of A Muslim Nation,* (Boulder: Westview Press, 1982).

Pye, L W, *Asian Power and Politics: The Cultural Dimensions of Authority* (Cambridge, Mass: Belknap Press, 1985).

Rahman, Sobhan, *The Crisis of External Dependence,* (Dhaka : University Press Ltd., 1982).

Rahman, Sobhan, *From Aid Dependence to Self-Reliance : Development Options for Bangladesh,* (Dhaka : Bangladesh Institute for Development Studies, 1990).

Siddiqi, Kamal, (ed.), *Local Government in South Asia : A Comparative Study,* (Dhaka : University Press Limited, 1992).

Umar, Badruddin, *Politics and Society of East Pakistan and Bangladesh,* (Dhaka : University Press, 1973).

Zirring, Lawrence, *Bangladesh: Mujib to Ershad,* (Karachi : Oxford University Press, 1992).

Index

Dr Dilara Choudhury is currently associated with the Department of Government and Politics at the Jahangirnagar University of Dhaka. Author of **Bangladesh and the South Asian International System** (Kazi Publications Inc., Chicago, 1992), Dr Choudhury is a prolific writer and contributes regularly to a number of professional journals. Twice, in 1989-90 and 1990-91, she has been to Columbia University as a visiting scholar.

ISBN 0 19 577507 4

Other Oxford Books

1. **The Resurgence of Central Asia**
   Islam or Nationalism

   Ahmed Rashid

   Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan — these are the five new states of Central Asia which have become independent following the breakup of the USSR. All have Muslim majorities and ancient histories; for the rest, they are very different. Ahmed Rashid, a frequent visitor to Central Asia during the years of perestroika, has written a uniquely informed account of the region's emergence from obscurity to independence.

2. **The English Language in Pakistan**

   Edited by Robert J. Baumgardner

   The English language includes many world-wide varieties of which Pakistani English is one. This volume is a collection of essays which focus on some of the significant linguistic differences in English as it is used in Pakistan. It approaches Pakistani English not only from a linguistic perspective, but also from historical and sociological perspectives.

3. **A History of Sindh**

   Suhail Zaheer Lari

   A readable one volume account of the history of Sindh, from the earliest times to the partition of the subcontinent. The book fills the need for a scholarly study of this troubled province of Pakistan and may help contribute to a more intelligent and meaningful discussion on the political problems of Sindh.

Oxford Univers
Pakistan

ISBN 0-19-577507-4
90000
9 780195 775075